84187-0 (S)

No. 27123-4

Kittitas County Superior Court Nos. 08-2-00195-7; 08-2-00210-4;
08-2-00224-4; 08-2-00231-7; 08-2-00239-2
Consolidated under No. 08-2-00195-7

original

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KITTITAS COUNTY, a political subdivision of the State of Washington, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU, and SON VIDA II,

Petitioners,

v.

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, and EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD,

Respondents.

KITTITAS COUNTY CONSERVATION'S, RIDGE'S, AND FUTUREWISE'S MOTION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONERS

Petitioners Kittitas County Conservation, RIDGE, and Futurewise (Kittitas County Conservation) are the respondents in the Kittitas County Superior Court administrative appeal at issue here. Kittitas County Conservation was the petitioner in front of the Eastern Washington Growth Management Hearings Board in the underlying case, and prevailed on all relevant issues in the Board's Final Decision and Order of March 21, 2008 in Case No. 07-1-0015.

II. DECISIONS BELOW

The Eastern Washington Growth Management Hearings Board issued its Final Decision and Order in *Kittitas County Conservation et al. v. Kittitas County*, Eastern Washington Growth Management Hearings Board Case No. 07-1-0015 on March 21, 2008 (In Appendix as Attachment [Att.] A) and the Honorable Michael E. Cooper, Kittitas County Superior Court issued his Memorandum Decision and Order of Stay in the *Central Washington Home Builders Association, the Building Industry Association of Washington, and Mitchell F. Williams d/b/a MF Williams Construction Co., Inc. v. Eastern Washington Growth Management Hearing Board, Kittitas County Conservation, RIDGE, and Futurewise*, Kittitas County

Superior Court Case No. 08-2-00195-7 entered on April 24, 2008 (In Appendix as Att. B).

III. ISSUES PRESENTED FOR REVIEW

Issues one through ten were framed as reasons why relief should be granted by the petitioners to the Superior Court, Petitioners/Intervenors Central Washington Home Builders Association, the Building Industry Association of Washington, and Mitchell F. Williams (BIAW Petitioners or BIAW); Petitioner/Intervenor Son Vida II; Petitioner/Intervenor Teanaway Ridge; Petitioner/Respondent Kittitas County; and Petitioner/Intervenor Kittitas County Farm Bureau. Kittitas County Conservation converted them to questions and did not duplicate issues.

1. Whether the Eastern Washington Growth Management Hearings Board (Board) erroneously applied the law by ruling that the Growth Management Act (GMA) does not allow rural densities of one dwelling unit per three acres?

2. Whether the Growth Board's decision finding Kittitas County's cluster ordinance and planned unit development ordinance noncompliant and invalid is an erroneous application of the law or is arbitrary and capricious?

3. Whether the Growth Board's decision finding that Kittitas County Code (KCC) 16.04 violates the GMA because the ordinance allows multiple exempt wells is outside the Board's jurisdiction, is an erroneous application of the law, or is arbitrary and capricious?

4. Whether the Growth Board's determination of invalidity is arbitrary and capricious, is outside the Growth Board's authority, is an erroneous application of the law, or is not supported by the evidence?

5. Whether the Board's decision on the Airport Overlay Zone (a) erroneously interpreted or applied the law; (b) the Board's decision is not support by evidence that is substantial when viewed in light of the whole record before the court; or (c) the Board's decision was arbitrary and capricious?

6. Whether the Board erroneously applied the law by ruling that the development regulations violate the GMA?

7. Whether the Board decision finding Kittitas County's Ordinance noncompliant and invalid is an erroneously application of the law or is arbitrary and capricious?

8. Whether the Board's Findings of Fact Numbers 3, 4, 5, 8, 9, Conclusions of Law Numbers 2, 5, 6, 7, 9, 10, and 11, Invalidity Findings of Fact 1, 2, 3, 4, 5, 6, 7, and Invalidity Conclusions of Law 2 and 3 are not supported by substantial evidence, are erroneous applications of the law, or are arbitrary and capricious?

9. Whether the Board's Findings of Fact Number 3, Conclusion of Law Number 2, and Invalidity Conclusion of Law 1 are outside the jurisdiction of the Board or are erroneous applications of the law to the facts or arbitrary and capricious?

10. Whether the Growth Board's determination that KCC 17.29 and KCC 17.31 are not complaint with the GMA is (a) contrary to law; (b) not supported by evidence that is substantial when viewed in the light of the whole record before the court, or (c) is arbitrary and capricious?

Kittitas County Conservation also presents the following issue as to the Superior Court stay we are appealing:

11. Whether the Superior Court stay is contrary to RCW 34.05.550 or other provisions of state law or is not supported by evidence in the record?

If this motion is granted, Kittitas County Conservation will move to consolidate this case with Court of Appeals Division III Case No. 26547-1-III consolidated with Case No. 26548-0-III. As we show below, there is a significant overlap in the issues in the two cases.

IV. STATEMENT OF THE CASE

On July 19, 2007, the Kittitas County Commissioners enacted their Kittitas County Development Code Update as Ordinance 2007-22. Kittitas County Conservation, RIDGE, and Futurewise (Kittitas County Conservation) commented on Ordinance 2007-22 through letters and testimony and filed a timely appeal. Several parties intervened, including the Building Industry Association of Washington, Central Washington Home Builders Association, Mitchell F. Williams, Son Vida, II, Teanaway Ridge, LLC, and the Kittitas County Farm Bureau. On March 21, 2008, the Board issued its Final Decision and Order (FDO). The Board found in favor of Kittitas County Conservation on seven out of eight issues.

Five Petitions for Review requesting judicial review of the FDO have been filed in Kittitas County Superior Court and were consolidated under Kittitas County Superior Court Cause No. 08-2-00195-7:

- Petitioners/Intervenors Central Washington Home Builders Association, the Building Industry Association of Washington, and Mitchell F. Williams (BIAW Petitioners or BIAW) filed a Petition for Review in Kittitas County Superior Court Case No. 08-2-00195-7 on April 4, 2008. This petition for review challenges the Board's decisions on the Agricultural-3 zone (chapter 17.28 Kittitas County Code [KCC]) which has a density of one dwelling unit per three acres and is applied to the rural area, the Rural-3 zone (chapter 17.30 KCC) which has a density of one dwelling unit per three acres and is applied to the rural area, the Performance Based Cluster Platting development regulations (chapter 16.09 KCC), the Planned Unit Development regulations (chapter 17.08 KCC); and the county's platting regulations (chapter 16.04 KCC). The petition for review also challenging the Board's finding of invalidity for these development regulations and the Urban Residential Zone (chapter 17.22 KCC) and the Forest and Range zone (chapter 17.56 KCC).
- Petitioner/Intervenor Son Vida II filed a Petition for Review in Kittitas County Superior Court Case No. 08-2-00210-4 on April

10, 2008. This petition for review challenges the Board's decision on the Kittitas County Airport Overlay Zone (chapter 17.58 KCC).

- Petitioner/Intervenor Teanaway Ridge, LLC filed a Petition for Review in Kittitas County Superior Court Case No. 08-2-00224-4 on April 16, 2008. This petition for review challenges the Board's decision on Issues 1, 2, 4, 5, and 6 and invalidity. Issue 1 addressed the densities allowed in the Agricultural-3 zone (chapter 17.28 KCC), Rural-3 zone (chapter 17.30 KCC), the Performance Based Cluster Platting development regulations (chapter 16.09 KCC), the Planned Unit Development regulations (chapter 17.08 KCC), the Detached Accessory Dwelling Units (chapter 17.08 KCC), the Urban Residential zone (Chapter 17.22 KCC), the H-T-C, Historic Trailer Court Zone (chapter 17.24 KCC), and the Forest and Range (F-R) zone (chapter 17.56 KCC). Issue 2 addressed the uses and densities allowed in the Performance Based Cluster Platting development regulations (chapter 16.09 KCC), the uses in the A-20 - Agricultural Zone (chapter 17.29 KCC), and the Planned Unit Development (PUD) Zone (chapter 17.36 KCC). Issue 4 addressed the county's platting regulations in chapter 16.04 KCC. Issue 5 was abandoned by the Kittitas County Conservation,

but Teanaway Ridge, LLC has apparently appealed the issue anyway. Issue 6 addressed the lack of guidelines and standards for the Limited Commercial Zone (chapter 17.32 KCC), the General Commercial Zone (chapter 17.40 KCC), and the Highway Commercial Zone (chapter 17.44 KCC).

- Petitioner/Respondent Kittitas County filed a Petition for Review in Kittitas County Superior Court Case No. 08-2-00231-7 on April 18, 2008. This petition for review challenges the Board's Findings of Fact numbers 3, 4, 5, 8, 9 and Conclusions of Law Numbers 2, 5, 6, 7, 9, 10, and 11. In addition, the county challenges Invalidity Findings of Fact 1, 2, 3, 4, 5, 6, 7 and Invalidity Conclusions of Law 1, 2, and 3. These provisions apparently address the Agricultural-3 zone (chapter 17.28 KCC), Rural-3 zone (chapter 17.30 KCC), the Performance Based Cluster Platting development regulations (chapter 16.09 KCC), the Planned Unit Development regulations (chapter 17.08 KCC), the Detached Accessory Dwelling Units (chapter 17.08 KCC), the zoning map adopted by chapter 17.12 KCC, the Urban Residential zone (Chapter 17.22 KCC), the H-T-C, Historic Trailer Court Zone (chapter 17.24 KCC), the Highway Commercial Zone (chapter 17.44 KCC), the

Airport Overlay Zone (chapter 17.58 KCC), and the Forest and Range (F-R) zone (chapter 17.56 KCC).

- Petitioner/Intervenor Kittitas County Farm Bureau filed a Petition for Review in Kittitas County Superior Court Case No. 08-2-00239-2 on April 21, 2008. This petition for review challenges the Board's decision on Issues 1, 2, 3, 4, and 7. Issue 1 addressed the densities allowed in the Agriculural-3 zone (chapter 17.28 KCC), Rural-3 zone (chapter 17.30 KCC), the Performance Based Cluster Platting development regulations (chapter 16.09 KCC), the Planned Unit Development regulations (chapter 17.08 KCC), the Detached Accessory Dwelling Units (chapter 17.08 KCC), the Urban Residential zone (Chapter 17.22 KCC), the H-T-C, Historic Trailer Court Zone (chapter 17.24 KCC), and the Forest and Range (F-R) zone (chapter 17.56 KCC). Issue 2 addressed the uses and densities allowed in the Performance Based Cluster Platting development regulations (chapter 16.09 KCC), the uses in the A-20 - Agricultural Zone (chapter 17.29 KCC), and the uses and densities allowed in the Planned Unit Development (PUD) Zone (chapter 17.36 KCC). Issue 3 addressed the uses allowed in designated agricultural lands of long-term commercial significance

by the Commercial Agriculture zone (chapter 17.31 KCC). Issue 4 addressed the county's platting regulations in chapter 16.04 KCC. Issue 7 addressed the "onetime split" processes in chapters 17.29 and 17.31 KCC.

Kittitas County Conservation applied to the Eastern Washington Growth Management Hearings Board (Board) for a Certificate of Appealability in all five Superior Court cases. On May 6, 2008, the Board issued Certificates of Appealability for all five cases.[1] On May 12, 2008, Kittitas County Superior Court Judge Cooper consolidated the five superior court cases. On May 14, 2008, Kittitas County Conservation filed by mail a Notice of Discretionary Review in consolidated Kittitas County Superior Court Cause No. 08-2-00195-7.

The Court of Appeals had previously granted Kittitas County Conservation's motion for direct review in Court of Appeals Case No.

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[1] See Appendix Att. C, Certificate of Appealability for the *Central Washington Home Builders Association, the Building Industry Association of Washington, and Mitchell F. Williams* judicial appeal Kittitas County Superior Court Case No. 08-2-00195-7; Att. D, Certificate of Appealability for the *Son Vida II* judicial appeal Kittitas County Superior Court Case No. 08-2-00210-4; Att. E, the *Teanaway Ridge, LLC* judicial appeal Kittitas County Superior Court Case No. 08-2-00224-4; Att. F, Certificate of Appealability for the *Kittitas County* judicial appeal Kittitas County Superior Court Case No. 08-2-00231-7; and Att. G, Certificate of Appealability for the *Kittitas County Farm Bureau* judicial appeal Kittitas County Superior Court Case No. 08-2-00239-2.

26547-1-III consolidated with Case No. 26548-0-III.[2] In that case Kittitas County and the BIAW Petitioners each filed petitions for review to Kittitas County Superior Court. Each petition alleged error in the Board's finding that the County's rural densities of one dwelling unit per three acres violated the GMA. The BIAW Petitioners also assigned error to the Board's findings that the County failed to provide for a variety of rural densities, and that the County's Performance Based Cluster Platting and Planned Unit Development Zone violated the GMA. The development regulations at issue in Court of Appeals Case No. 26547-1-III consolidated with Case No. 26548-0-III are earlier versions of several of the development regulations at issue in this case and so there is a significant overlap between the two sets of appeals.

On April 24, 2008, Kittitas County Superior Court Judge Cooper issued an order staying the Board's decision for the Agricultural-3 zone (chapter 17.28 KCC) which has a density of one dwelling unit per three acres and is applied to the rural area, the Rural-3 zone (chapter 17.30 KCC) which has a density of one dwelling unit per three acres and is

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[2] See Appendix Att. H, *Kittitas Conservation et al. v. Kittitas County*, No. 26547-1-III consolidated with *Central Washington Homebuilders Association et al. v. Eastern Washington Growth Management, et al.*, 26548-0-III Commissioner's Ruling p. 2 (January 15, 2008), p. H-2.

applied to the rural area, the Performance Based Cluster Platting development regulations (chapter 16.09 KCC), the Planned Unit Development regulations (chapter 17.08 KCC); and the county's platting regulations (chapter 16.04 KCC).[3] The Kittitas County Superior Court stay also covered the Board's finding of invalidity for these development regulations and the Urban Residential Zone (chapter 17.22 KCC) and the Forest and Range zone (chapter 17.56 KCC).[4]

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

RAP 6.3 and RCW 34.05.518 govern direct review of the decisions of environmental boards, including the Growth Management Hearings Boards, and provide that the Court should accept direct review based upon the same standards upon which the Board should issue a certificate of appealability, specifically if it "finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) fundamental and urgent statewide or

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[3] *Central Washington Home Builders Association, the Building Industry Association of Washington, and Mitchell F. Williams d/b/a MF Williams Construction Co., Inc. v. Eastern Washington Growth Management Hearing Board, Kittitas County Conservation, RIDGE, and Futurewise,* Kittitas County Superior Court Case No. 08-2-00195-7 Memorandum Decision and Order of Stay pp. 2-9 (April 24, 2008) in Att. B pp. B-2-B-9.

[4] *Id.*

regional issues are raised; or, (ii) the proceeding is likely to have significant precedential value."[5] Because the Board has issued a certificate of appealability and because all of the statutory criteria are met, this court should accept direct review.

A. A delay in obtaining a final and prompt determination of the issues in this matter is detrimental to all parties and the public interest.

In addressing this issue, the Board has held that:

> It is important to have this matter decided by Division Three of the Court of Appeals as soon as possible. The issue will have great precedential value in Eastern Washington and the State as a whole. The resolution of these issues will be of great benefit to the parties and their local constituencies.[6]

All parties are benefited by a rapid and binding resolution of this case. Given the scope of the issues presented and the acreage affected by the Board's ruling, it seems unlikely that the losing side at the Superior

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[5] RCW 34.05.518(5). RAP 6.3 provides:

> The appellate court accepts direct review of a final decision of an administrative agency in an adjudicative proceeding under RCW 34.05.518 and RCW 34.05.522 by entering an order or ruling accepting review. In requesting direct review, the parties shall follow the procedures set forth in rule 6.2.

RAP 6.2(c) provides:

> Regular Motion Procedure Governs. A motion for discretionary review is governed by the motion procedure established by Title 17.

[6] Att. B, Certificate of Appealability at p. 4, p. B-4. The other Certificates of Appealability have the same conclusion.

Court level would fail to appeal.[7] Kittitas County Conservation is harmed by delay because development applications can vest to the noncompliant code even while an appeal is pending. Washington's vesting law allows applications to vest upon filing.[8] This harm is especially grave here, where the Eastern Board made a finding of invalidity that would have prevented vesting which the Kittitas County Superior Court has stayed. Thus, even though the Board has found noncompliant and invalid the County's three acre rural zoning and other provisions, land can still be divided during the pendency of the appeal, and housing that harms working farms and forests, water quality, and the rural area constructed.

As Kittitas County Conservation demonstrated during the Hearing on the Merits in this matter, three acre plots lead to sprawl, degradation of water quality, transportation and other public service provision problems, and endanger farming and other natural resource industries, and imperil water rights. Thus, the interests of Kittitas County Conservation and the public are aided by a rapid resolution of the appeal, allowing the County to repair its error in allowing urban densities in the rural area in the near rather than far future.

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[7] *Id.*
[8] RCW 36.70A.302.

The BIAW and other appellants are aided by a rapid resolution as well. Even though applications can vest, property owners and the businesses represented by BIAW and others still face uncertainty regarding the future of density in Kittitas County for those properties where the owner or potential purchaser is unable or unwilling to file a permit application. Uncertainty regarding the development potential of a property may make sale difficult, as well as making it more difficult to obtain financing for a property. Furthermore, the long-term business interests of BIAW and other developers are harmed by sprawl zoning. Poorly flowing traffic, inadequate water and sewer, poor fire protection, and a degraded environment are not good selling points for real estate. A binding ruling requiring the County to fix its sprawl zoning will aid the long-term economic health of the region, and the long-term interests of BIAW and the other appellants.

The courts will also benefit by granting this motion. There is significant overlap between the issues in this case and the issues in Court of Appeals Case No. 26547-1-III consolidated with Case No. 26548-0-III. The three acre rural density is an issue in each case. The County's Performance Based Cluster Platting is an issue in each case. The Planned Unit Development Zone is an issue in each case. It will be most efficient

to grant this motion. Consolidate them before the Court of Appeals and decide them as one package. This will result in significant economies of judicial resources. It also avoids the potential for inconsistent judicial decisions on the same issue.

B. Fundamental and urgent statewide or regional issues are raised.

The Board has found that "[t]he issues raised herein are fundamental and of urgent regional and statewide interest."[9] As discussed above, Kittitas County's urban densities in the rural area are bad for water quality and the environment. Water quality knows no borders; regional supplies are at risk. Furthermore, traffic, wildfires, and agricultural markets and communities are not constrained within the County. Adjacent counties and the region as a whole stand to benefit from careful land use planning in Kittitas County.

Furthermore, Kittitas County's noncompliant rural densities create an unfair playing field in the short-term for builders and developers operating in adjacent GMA-compliant counties. In the long-term, adequate rural densities aid the economic health of a region. In the immediate future, though, it is more profitable to build sprawl housing

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[9] Att. B, Certificate of Appealability at p. 4, p. B-4.

without paying for infrastructure than it is to build at appropriate rural levels, or pay for urban-level services. Thus, builders in Yakima, Grant, and King counties must abide by GMA-compliant densities, while competing with Kittitas County builders who have an unfair competitive advantage under the Kittitas County comprehensive plan found noncompliant by the Board.

In addition, there are no cases from Division Three of the Court of Appeals on the issue of what rural densities comply with the GMA. There are no Division Three decisions on the requirements for clustering and planned unit development regulations. There are no Division Three decisions on the variety of rural densities issue. There are no Division Three decisions on RCW 36.70A.510's and RCW 36.70.547's requirements that counties and cities "shall" discourage incompatible uses adjacent to the airports. There are no Division Three decisions on stays of Board decisions.

C. The proceeding is likely to have significant precedential value.

The Board has correctly noted that:

> The issue will have great precedential value in Eastern Washington and the State as a whole. . . It is unlikely that the Superior Court will have the final review. Direct review by the Court of Appeals

will be a more efficient use of the judicial system[']s valuable time.[10]

In addition to the factors described above, in 2005, the Washington Supreme Court noted in *Viking Properties v. Holm* that Growth Boards cannot set "bright line rules" regarding density.[11] Few decisions have applied this ruling, and none have been considered by the Supreme Court.[12] The appellate courts have yet to provide binding guidance on when a Board violates *Viking Properties'* bright-line rule conclusion, and whether previous rulings from all three Boards holding that one dwelling unit per five acres is the minimum rural density may be utilized as a benchmark or presumption, or are a fact-based application of the GMA's prohibitions on urban growth outside urban growth areas.[13] Clarity is required, and Kittitas County Conservation requests that this court provide guidance.

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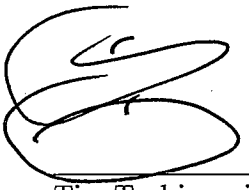
[10] Att. B, Certificate of Appealability at p. 4, p. B-4.
[11] *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).
[12] *Normandy Park v. CPSGMHB*, 78630-5, a case involving urban densities and bright-line rules, was granted review but then dismissed by the appellant.
[13] *Gold Star Resorts, Inc. v. Futurewise*, 140 Wn. App. 378, ___, 166 P.3d 748, 760 – 61 (2007) (footnotes omitted) *petition for review filed* Wn. Supreme Ct. No. 80104 (Oct. 26, 2007) (Agid, J., concurring), noting that one dwelling unit per five acres rulings in the Boards' jurisprudence is a "rebuttable presumption," not a "bright-line rule."

VI. CONCLUSION

For the reasons set forth herein, Kittitas County Conservation respectfully requests that this court accept direct review of this matter.

RESPECTFULLY SUBMITTED and signed on this 14th day of May, 2008,



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CERTIFICATE

I certify that I mailed a copy of the foregoing KITTITAS COUNTY CONSERVATION'S, RIDGE'S, AND FUTUREWISE'S MOTION FOR DISCRETIONARY REVIEW to the following attorneys and parties at their following office addresses, postage prepaid, on May 14, 2008. Service was also provided as shown below.

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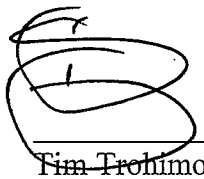

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Appendix

A-H. A

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE, Petitioners, v. KITTITAS COUNTY, Respondent, SON VIDA II, TEANAWAY RIDGE, LLC, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., KITTITAS COUNTY FARM BUREAU, Intervenors.	Case No. 07-1-0015 FINAL DECISION ORDER

I. SYNOPSIS

A Petition for Review was timely filed by Kittitas County Conservation, RIDGE, and Futurewise (Petitioners), challenging a number of development regulations adopted by Kittitas County (County) in its Development Code Update, Ordinance 2007-22. The Petitioners raised eight issues contending the County failed to comply with the Growth Management Act (GMA) and violated the following statutes: RCW 36.70A.020, Goals 1-3, 5, 6, 8-10, 11-12; 36.70A.040; 36.70A.060; 36.70A.070; 36.70A.110; 36.70A.130;

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36.70A.177; and 36.70A.510. In addition, the Petitioners contend the County's development regulations at issue in the petition, if found non-compliant, warrant invalidity.

The Respondent[1] and Intervenors[2] argue three points: (1) the amended development regulations in Ordinance 2007-22 are in compliance with the GMA, (2) the Petitioners' issues are moot, misapplications of the law, and (3) the Petitioners' issues do not justify an issuance of an order of invalidity. The County also contends many of the Petitioners' issues will be resolved by the adoption of its new Comprehensive Plan and development code. The County and Intervenors argue the County's planning decision is presumed valid and is to be given greater than substantial deference; the Petitioners have a high burden to show the County's decision was clearly erroneous; and the Petitioners have failed to meet this burden in this matter. The Intervenors argue the County's development regulations, as amended by Ordinance 2007-22, were adopted pursuant to Washington State's Growth Management Act (GMA) and are presumed valid. The Intervernos contend that before the Eastern Washington Growth Management Hearings Board (Board) can find an action clearly erroneous, the Board must be left with the firm and definite conviction that a mistake has been committed. The Intervenors also argue the proper burden of proof cannot be overstated.

The Board studied the issues as presented and determined from the parties' arguments, the record, past Hearings Boards' decisions, case law, and the requirements set forth in the GMA, whether the County complied with RCW 36.70A. Rather than reiterate the Board's analysis for every issue here in the Synopsis, only a summary of the conclusions will be given.

The Board finds the Petitioners carried their burden of proof in the following issues: No. 1 (rural densities), No. 2 (urban uses in rural areas), No. 3 (urban uses in agricultural

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[1] Kittitas County.

[2] Son Vida II; Building Industry Association of Washington (BIAW); Central Washington Home Builders Association (CWHBA); Mitchell Williams, d/b/a MF Williams Construction Co; Teanaway Ridge, LLC; Kittitas County Farm Bureau.

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lands of long-term significance), No. 4 (water quality and quantity on land with common ownership), No. 6 (Highway Commercial Zone), No. 7 (one-time splits), and No. 8 (Airport Zone uses).

The Board finds the Petitioners failed to carry their burden of proof in the following issue: No. 5 (urban governmental services outside of urban growth areas).

II. INVALIDITY

The Board further grants the Petitioners' request for a finding of invalidity and finds the County's actions argued in Issue No. 1 invalid. (See section VI below).

III. PROCEDURAL HISTORY

On September 24, 2007, KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE, by and through their representative, Keith Scully, filed a Petition for Review.

On October 9, 2007, the Board received SON VIDA II and TEANAWAY RIDGE, LLC's, Motions to Intervene in EWGMHB Case No. 07-1-0015.

On October 15, 2007, the Board received BIAW's, CWHBA's, and MITCHELL WILLIAMS', Motion to Intervene in EWGMHB Case No. 07-1-0015. Also on October 15, 2007, the Board received Kittitas County Farm Bureau, Inc., Motion to Intervene in EWGMHB Case No. 07-1-0015.

On October 22, 2007, the Board heard the Motions to Intervene filed by the aforementioned parties before the Prehearing conference. The Board grants Intervenor status to Son Vida, II, Teanaway Ridge, LLC, BIAW, CWHBA, Mitchell Williams, and Kittitas County Farm Bureau. The parties are intervening on behalf of the Respondent. The Intervenors are instructed to file one consolidated hearing on the merits brief on the due date provided in the schedule below.

On October 22, 2007, the Board held the telephonic Prehearing conference. Present were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken. Present for the Petitioners were Keith Scully. Present for the Respondent was Neil Caulkins. Present for Intervenors Son Vida, II, and Teanaway Ridge, LLC, was Jeff Slothower. Present for Intervenors BIAW, Central Washington Home Builders Association,

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and Mitchell Williams was Andrew Cook. Present for Intervenor Kittitas County Farm Bureau was Gregory McElroy.

On October 22, 2007, the Board issued its Prehearing Order.

On November 13, 2007, the Board received Intervenors Son Vida II, and Teanaway Ridge, LLC's Partial Motion to Dismiss/or in the Alternative Stay. The Board also received Kittitas County's Motion to Consolidate or in the Alternative Stay or Dismiss.

On November 20, 2007, the Board received Petitioners' Response to Motions to Dismiss, Consolidate, and/or Stay.

On November 30, 2007, the Board received Intervenors Son Vida's II Reply to Petitioners' Response to Motions to Dismiss, Consolidate, and/or Stay and Declaration of Jeff Slothower. The Board also received Respondent Kittitas County's Rebuttal in its Motion to Consolidate, Stay, or Dismiss.

On December 14, 2007, the Board held a telephonic motion hearing. Present were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken. Present for the Petitioners were Keith Scully. Present for the Respondent was Neil Caulkins. Present for Intervenors Son Vida, II, and Teanaway Ridge, LLC, was Jeff Slothower. Present for Intervenors BIAW, Central Washington Home Builders Association, and Mitchell Williams was Andrew Cook. Present for Intervenor Kittitas County Farm Bureau was Gregory McElroy.

On December 19, 2007, the Board issued its Order on Motions.

On February 13, 2008, the Board held the hearing on the merits. Present were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken. Present for the Petitioners were Tim Trohimovich. Present for the Respondent was Neil Caulkins and Darryl Piercy. Present for Intervenors Son Vida, II, and Teanaway Ridge, LLC, was Jeff Slothower. Present for Intervenors BIAW, Central Washington Home Builders Association, and Mitchell Williams was Andrew Cook. Present for Intervenor Kittitas County Farm Bureau was Gregory McElroy.

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IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act. The Board ". . . shall find compliance unless it determines that the action by the . . . County. . . is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [Growth Management Act]." RCW 36.70A.320. To find an action clearly erroneous, the Board must be ". . . left with the firm and definite conviction that a mistake has been committed." *Department of Ecology v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

The Hearings Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

The Hearings Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

V. ISSUES AND DISCUSSION

Issue No. 1:

Does Kittitas County's failure to eliminate densities greater than one dwelling unit per five acres in rural areas outside of the urban growth areas and limited areas of more intensive rural development (LAMIRDs) in chapters 16.09, 17.08, 17.12, 17.22, 17.24, 17.28, 17.30, and 17.56 Kittitas County Code (KCC) violate RCW 36.70A.020 (1-2, 8-10,

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12), 3.670A.040, 36.70A.070, 36.70A.110 and 36.70A.130?

The Parties' Position:

Petitioners:

The key issue in the Petitioners' Issue No. 1 in this case is similar in content and argument to their Issue No. 1 in Case No. 07-1-0004c, primarily that the County allows rural land use designations that violate the GMA by allowing urban growth in the rural area. In Case No. 07-1-0004c, the Board ruled that densities of 1 du/3 acres in the rural area of Kittitas County are non-compliant with the GMA. Since there have been no changes in the law since Case No. 07-1-0004c was decided, and there are no differences in material fact, the Petitioners believe the Board should again find the County out of compliance in this issue.

The Petitioners cite RCW 36.70A.070(5)(b) and RCW 36.70A.110(1) to emphasize their argument that the rural element shall provide appropriate rural densities and uses not characterized by urban growth and urban growth is prohibited outside of urban growth areas. The Petitioners argue all three Growth Boards have held the "minimum rural density is 1 dwelling unit per 5 acres of land"[3], and emphasize this determination is not a "bright line" rule, but rather a county's discretion on rural lot sizes or density, is limited by the GMA, and must be justified in the record. The Petitioners contend development regulations are the tool by which counties implement their comprehensive plan and must be consistent with the plan.

According to the Petitioners, in *Diehl v. Mason County,* the Court of Appeals determined that residential densities of one housing unit, or more, per 2.5 acres "would allow for urban-like development, not consistent with primarily agricultural uses.[4] The Petitioners also point to the United States Census of Agriculture, which shows the average

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[3] Petitioners' HOM brief at 8.

[4] Diehl v. Mason County, 94 Wn. App. 645, 656, 972 P.2d 543, 548 (1999).

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size of a small farm in Kittitas County to be 5.68 acres.[5] According to the Petitioners, this is almost twice the minimum density in the Agricultural-3 and Rural-3 zones found in Kittitas County. The Petitioners cite to *Tugwell v. Kittitas County* where the Court of Appeals determined that parcels of less than 20 acres are too small to farm and are incompatible with the primary use of land as defined in RCW 36.70A.170.[6] Also, the Petitioners contend the reports and previous cases, as to the size of farms and their viability, show that five acres or more is needed to ensure agricultural viability and rural character.

The Petitioners contend water quantity and quality is impacted by small acreage lots and violates the GMA, specifically Goal 10 in RCW 36.70A.020 and RCW 36.70A.070(5)(c)(vi). The County's development regulations, according to the Petitioners, must be consistent with its Comprehensive Plan (CP) and must comply with both the GMA's goals and requirements to protect surface and ground water quality and quantity.

In addition, the Petitioners argue urban densities of 1 du/3 acres violate RCW 36.70A.110(1), which requires the County to encourage urban growth in urban areas. This Board found the County's rural element fails to do this in Case No. 07-1-0004c by allowing "147,714 building lots in the rural area through rezones and subdivisions into three acre lots."[7]

The Petitioners further argue that prior Board cases, which found 2.5 acre lots in rural areas compliant, is not applicable in this case because the County has not developed the required written record explaining how local circumstances are applicable and the GMA is satisfied.[8]

The Petitioners contend several of the County's land use zones, Urban Residential Zone, Historic Trailer Court (HTC) Zone, Forest and Range Zone and Performance Based

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[5] U.S. Dept. of Agriculture National Agricultural Statistics Service, 2002 Census of Agriculture Washington State and County Data Volume 1, Geographic Area Series Part 47 AC-02-A-47 p. 240 (June 2004).

[6] Tugwell v. Kittitas County, 90 Wn. App. 1, 9, 951 P.2d 272, 276 (1997).

[7] Petitioners' HOM brief at 11citing to 07-1-0004c FDO.

[8] Petitioners' HOM brief at 12 citing to RCW 36.70A.070(5)(a).

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Cluster Platting allow urban-like densities in the rural areas, as does KCC 17.08.022 Accessory Dwelling Unit, which permits a detached unit from the primary residence. The Petitioners argue that all three Hearings Boards have found these urban-like zones out of compliance in other cases and this Board should do so here.

In conclusion, the Petitioners request the Board to find the provisions of KCC chapters 16.09, 17.08, 17.12, 17.22, 17.24, 17.28, 17.30, and 17.56 violate the GMA and remand them to the County for action consistent with the GMA.

Respondent:

The Respondent, Kittitas County, contends its proposed revisions to its CP "will limit where the denser zones can be."[9] Basically, the County raises a defense that it is in the process of adopting an ordinance that will rectify many of the Petitioners' concerns. The County argues the Urban Residential Zone will be limited to areas within the Urban Growth Areas (UGA), and the Accessory Dwelling Unit chapter will be subject to underlying zoning densities and reviewed by administrative means. The Respondent points out the HTC zone is simply recognition of existing trailer courts and does not allow for the creation of new ones unless the trailer courts comply with the underlying zoning densities. In addition, the Respondent contends the Forest and Range Zone cannot be divided more densely than 1 du/5 acres. The Respondent also contends bonus density will not create lots denser than 1 du/3 acres and a bonus will not be available for three-acre parcels.

Intervenors:

The Kittitas County Farm Bureau, Central Washington Home Builders Association, Mitchell Williams, Building Industry of Washington and Teanaway Ridge L.L.C., collectively called the Intervenors, argue the Board should dismiss the claim by the Petitioners that "the GMA imposes a bright line rule of one dwelling unit per five acres."[10] The Intervenors contend the GMA mandates a bottom-up planning approach, and the *Viking Properties v.*

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[9] Respondent's HOM brief at 2.

[10] Intervenors' HOM brief at 5.

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Holm ruling held that Hearings Boards do not have the authority to impose a bright line, nor elevate certain goals, such as reducing sprawl and encouraging urban development in the urban areas, to a higher priority than other goals, such as affordable housing, economic development and property rights.[11]

The Intervenors contend the GMA is absent of any reference to a bright line rule requiring a minimum density of 1 du/5 acres within the rural areas. Instead, the GMA allows local jurisdictions to apply innovative techniques, such as clustering, which Kittitas County's Rural-3 Zone allows. Contrary to the Petitioners' assertion concerning *Diehl v. Mason County*[12], and their argument concerning *Viking*[13] and the *Gold Star v. Futurewise*[14] decisions, the Intervenors contend the courts have held there is no bright line of 1 du/5 acre rural density.

The Intervenors further argue the County's development regulations for performance-based cluster platting is permitted under the GMA as an innovative technique, and the "soon to be adopted" development regulations protect open space and restrict density bonuses.[15]

Petitioners Reply:

The Petitioners contend the County's argument that pending development code regulations will moot many of the Petitioners' issues is incorrect. The Petitioners argue an issue is moot only if a board can no longer provide effective relief. Furthermore, the Petitioners contend the proposal to enact something is very different from actually doing so, and the issues are not moot until GMA-compliant development regulations have been enacted. According to the Petitioners, while the Intervenors argument that a stay has been

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[11] Viking Properties, Inc. v. Holm, 155 Wn.2d 112 (2005) (holding that the Growth Management Hearings Board does not have the authority to establish public policy, such as bright line rules).

[12] Intervenors' HOM brief at 5.

[13] Id.

[14] Gold Star Resorts v. Futurewise, 140 Wn. App. 378, 166 P.3d (2007).

[15] Intervenors HOM brief at 14-15.

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issued in the County's appeal of 07-1-0004c is true, the stay does not cover this case and, in fact, stay's only certain issues in the prior case. The Petitioners contend the Board still has authority over this case.

Board Analysis:

There are several components to Issue No. 1 that need to be addressed by the Board. The primary issue is whether Kittitas County failed to eliminate densities greater than 1 du/5 acres in rural areas outside of the urban growth areas and limited areas of more intensive rural development (LAMIRDs), and whether certain provisions of the development code allow inappropriate densities. But there are also two other underlying issues raised by the Respondent and Intervenors that also need to be addressed; that of the challenge being moot, and the question of the impact of the court's stay in Case No. 07-1-0004c. The Board will address these two issues first.

The County claims to be in the process of enacting an ordinance to correct many of the challenged items and, as such, believes many, if not all, the Petitioners' issues are moot. The Board disagrees. The mere fact the County is working on a new ordinance it believes will remedy the Petitioners' concerns does not provide a basis for an issue to be moot. The issue is moot only if the Board can no longer provide effective relief. In *Orwick v. Seattle*,[16] the court provided a definition of moot and this was later cited by the Central Board in *McVittie v. Snohomish County*.[17] This Board adheres to the same definition:

> In *Orwick v. Seattle*, 103 Wn 2d 249 (1984), the court stated, "A case is moot if a court can no longer provide effective relief." The *Orwick* court also recognized an exception to moot cases involving "matters of continuing and substantial public interest."

A proposal by the County to enact future legislation is irrelevant to the Petitioners' issues, which are not moot until compliant development regulations have been put in place. In this case, the Board can still provide effective relief to the Petitioners.

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[16] *Orwick v. Seattle*, 103 Wn 2d 249 (1984).

[17] Jody McVittie et al., v. Snohomish County et al., CPSGMHB Case No. 99-3-0016c, FDO (Feb. 9, 2000).

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In the matter of the Court's stay of Case No. 07-1-0004c and its effect on this case, the stay does not cover this appeal. The court-issued stay does not change the non-compliant nature of the County's CP provisions; it only stays the County's duty to comply with the Board's schedule for compliance.

As to the primary issue of three-acre zoning, in Case No. 07-1-0004c, the Board found the County out of compliance for allowing urban-like densities in the rural areas, in particular, the County's Agriculture-3 and Rural-3 zoning. As such, the Board concluded:

> The Board finds that the densities allowed by regulations Agriculture-3 and Rural-3 are urban in the rural element and not in compliance with the Growth Management Act and the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act.[18]

The critical statement in the Board's conclusion is "...the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act". The preparation of this written record is a GMA requirement found in RCW 36.70A.070(5)(a).

The Petitioners in this case have shown through definitions, expert opinion, statutes, and past court and board decisions that 1 du/3 acre zoning allowed in the County is more urban-like in nature and violates the GMA. This is not a "bright line" definition as the Respondent and Intervenors would like us to find, rather it is the end-result of an accumulation of quantitative data which points to an appropriate lot size for rural development. As the GMA requires, the County may apply local circumstances to its rural element in deciding density, but it also must develop a written record explaining how the rural element meets the requirements of the GMA. The County has failed to do this.

The Petitioners have shown the following: (1) that GMA requirements, such as RCW 36.70A.070(5)(a), control over goals, as the Supreme Court wrote in *Lewis County*[19]; (2)

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[18] KCC et. al., v. Kittitas County, EWGMHB Case No. 07-1-0004c, FDO (Aug. 20, 2007).

[19] Lewis County v. WWGMHB, 157 Wn.2d 488, 504, 139 P.3d 1096, 1104 (2006).

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that small urban-like lots affect water quality and quantity[20]; (3) that urban growth refers to growth which makes intensive use of land to such a degree as to be incompatible with the primary use of land for agriculture[21]; (4) that the rural element shall provide densities consistent with rural character[22]; (5) that development regulations shall be consistent with a county's comprehensive plan[23]; (6) that *Tugwell v. Kittitas County* suggests the size of a lot to produce food or other agricultural products is greater than five acres[24]; (7) that three-acre zoning throughout Kittitas County fails to provide for a variety of rural densities[25]; and (8) that in the *Gold Star Resorts v. Futurewise*[26] the court held that the Growth Boards retain some discretion as to what is urban and what is rural based on local circumstances and the written record, as long as *Viking* is taken into consideration.

The Board stands by its decision in Case No. 07-1-0004c, which concerns three-acre zoning in Kittitas County. Rather than reiterate the same analysis for this case, the Board incorporates by reference in its entirety the Board Analysis set forth in Legal Issue No. 1 for the prior case, *Kittitas Conservation, et al.*, EWGMHB Case No. 07-1-0004, FDO at 15-17.

As for the other provisions of the County's development code, including KCC 17.22, Urban Residential Zone; KCC 17.24, Historic Trailer Court Zone,; KCC 17.56, Forest and Range Zone; KCC 16.09, Performance Based Cluster Platting; and KCC 17.08.022, Accessory Dwelling Unit, which the Petitioners contend allow urban-like densities in the rural areas, the Board will address each one separately.

In their HOM brief, the Respondent indicates that the amendment currently under consideration by the County, KCC 17.22 Urban Residential Zone, "will be limited to areas

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[20] Petitioners HOM brief at 9-11.

[21] RCW 36.70A.030(18).

[22] RCW 36.70A.070(5)(b).

[23] RCW 36.70A.040.

[24] Tugwell v. Kittitas County, 90 Wn. App.1, 9, 951 P.2d 272, 276 (1997).

[25] Petitioners HOM brief at 11.

[26] Gold Star Resorts v. Futurewise, 140 Wn. App. 378, 166 P.3d 748 (2007).

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within the Urban Growth Areas (UGA's) and those areas formerly designated Urban Residential that are outside a UGA will immediately become Rural and subject to those densities."[27] This statement indicates to the Board that the County recognizes its Urban Residential Zone is out of compliance and it will amend KCC 17.22 in its upcoming code revision. But until such a code revision, the Board finds the County out of compliance in this issue.

According to the Petitioners, KCC 17.24 Historic Trailer Court Zone is allowed outside of urban growth areas and allows for urban density. The County argues KCC 17.24 is just recognition of existing trailer courts and the creation of new ones is not allowed unless they comply with the underlying zoning. The Board agrees with the Respondent. KCC 17.24 recognizes an existing use and specifically states, "The purpose and intent of the trailer court zone is to recognize established mobile home developments located in Kittitas County. No further expansion of these developments is allowed."[28]

KCC 17.56 Forest and Range Zone has a minimum lot size of twenty acres, but also allows one-half acre minimum lot sizes for any lot within an approved platted cluster subdivision served by public water and sewer, and six-thousand square feet for lots on existing municipal sewer and water systems. There is no maximum density. In their brief, the Respondent acknowledges, "[T]here will be no bonus density that will create lots denser than one unit per three acres" and "[T]here will be no bonus density available for three-acre parcels and the bonus density available for five-acre parcels cannot create anything smaller than three acres in size."[29] The Board agrees with the Petitioners that allowing for the creation of three acre lots within the rural area effectively permits urban density in the rural area and finds KCC 17.56 out of compliance with the GMA.

As with the Urban Residential Zone, the County recognizes KCC 17.08.022 Accessory

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[27] Respondent's HOM brief at 3.

[28] KCC 17.24.010 (emphasis added).

[29] Respondent's HOM brief at 3.

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Dwelling Unit is out of compliance and "will be remedied".[30] KCC 17.08.022 fails to provide that an accessory dwelling unit must comply with any density limits for the few zones that have them. The Board agrees with the Petitioners and finds KCC 17.08.022 is out of compliance for allowing urban-like growth in the rural areas.

The Board found the County's KCC 16.09 Performance Based Cluster Platting, out of compliance in Case No. 07-1-0004c and reaches the same conclusion here. KCC 16.09 allows densities of 1 du/1.5 acres for the Agriculture-3 and Rural-3 zones and densities of 1 du/2.5 acres in the Agriculture-5 and Rural-5 zones. These densities are urban densities, violate the GMA, and are out of compliance.

KCC 17.12 Zones Designated –Map divides the County into 22 zones, two of which are KCC 17.28 Agriculture-3 and KCC 17.30 Rural-3, which have been found by this Board to be non-compliant. The Official Zoning Map of Kittitas County is referenced through KCC 17.12. The zones are established and shown on the Official Zoning Map and are "...as much a part of this title as if the matters and information set forth by said maps were all fully described herein."[31] As such, the Board finds KCC 17.12 out of compliance in regards to KCC 17.28 and KCC 17.30.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence that the actions of the County, complained of herein, are clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds that the densities allowed by Agriculture-3 (KCC 17.28) and Rural-3 (KCC 17.30) are urban in the rural element and not in compliance with the Growth Management Act and the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act. The Board also finds that Kittitas County Code Chapters 16.09,

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[30] Id.

[31] Kittitas County Code, Title 17, Zoning, KCC 17.12.020, p. 21

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17.08, 17.12 (zoning map), 17.22, and 17.56 allow urban-like densities in the rural areas and are not in compliance with the GMA.

The Board finds the Petitioners have failed to carry their burden of proof in regards to KCC 17.24, the Historic Trailer Court Zone.This provision of the KCC is in compliance.

Issue No. 2:

Does Kittitas County's failure to prohibit urban uses and urban development in rural areas in chapters 16.09, 17.12, 17.29, and 17.36 KCC and the failure to include standards to protect the rural area violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.040, 36.70A.070, 36.70A.110, and 36.70A.130?

The Parties' Position:

Petitioners:

The Petitioners contend the County impermissibly allows urban uses in its rural area and fails to include standards to protect the rural character as required by RCW 36.70A.070(5)(b) and RCW 36.70A.110(1). The Petitioners also argue rural character has both a "functional and a visual component" as determined in *Vashon-Maury v. King County*. The functional component refers to a dependency on a "rural setting" and the visual component refers to the "visual character of the traditional rural landscape."[32] The Petitioners contend there are two exceptions to the prohibition on urban growth in rural areas: (1) uses dependent on location in a rural area, such as saw mills and campgrounds, and (2) essential public facilities as described in RCW 36.70A.200(1).

The County recognizes RCW 36.70A.070(5)(c) and its requirement to contain and control rural development, but permits uses in the Agricultural-20 Zone inconsistent with its own definition of rural character in the KCC. The Petitioners argue the County's development regulations must be "consistent with and implement the comprehensive plan..."[33] According to the Petitioners, KCC 17.29 A-20 Agricultural Zone allows urban uses in the rural area, such as kennels, auctions, hospitals, museums and convalescent homes.

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[32] Vashon-Maury v. King County, CPSGMHB Case No. 95-3-0008, FDO at 48, 1995 WL 903209 (Oct. 23, 1995).

[33] RCW 36.70.040(4)(d).

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The Petitioners point out the Western Board cited kennels and auction houses in rural areas as examples of non-resource based uses prohibited outside UGAs when it invalidated similar provisions in Mason County.[34]

The Petitioners agree some types of hospitals, museums, and convalescent homes "might be permissible in the rural area, if Kittitas County had standards in place to keep intact rural character and limit the size of development", but the KCC fails to have development standards or size limitations to preserve rural character visually, or protections for natural resources, such as water, from over-sized institutions.[35]

Additionally, the Petitioners argue that KCC 17.29 A-20 also allows in the Agricultural-20 Zone "any use not listed which is nearly identical to a listed use, as judged by the administrative official..."[36] The Petitioners contend this violates the GMA in that it does not limit the allowed uses to those that are not urban development, thus lacking adequate standards for staff.

The Petitioners contend KCC 17.36, the Planned Unit Development (PUD) Zone, allows a variety of urban uses in the rural area, such as multi-family structures, manufactured home parks, hotels, motels, condominiums, retail businesses, commercial-recreation businesses, restaurants, cafes, taverns, cocktail bars and any other similar uses. The Petitioners argue these uses are not limited to those that serve the rural areas, do not include standards to protect rural character, and do not comply with RCW 36.70A.070(5)(c). In addition, the Petitioners claim the PUD Zone does not include any maximum density for the residential uses it allows in the rural areas, and lacks the standards this Board held were necessary to comply with the GMA in Case No. 07-1-0004c.[37]

Respondent:

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[34] Dawes v. Mason County, WWGMHB Case No. 96-2-0023, Order Finding Invalidity (Jan. 14, 1999).

[35] Petitioner's HOM brief at 19.

[36] KCC 17.29.020(18).

[37] Kittitas County Conservation et al., v. Kittitas County et al., EWGMHB Case No. 07-1-0004c, FDO at 47-54 (August 20, 2007).

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The Respondent contends PUD's are allowed under the GMA and all developments in PUD's permitted in Kittitas County must comply with rural zoning densities. In addition, PUD's must go through an extensive public process to ensure compatibility with the rural character.

Intervenors:

The Intervenors point out the Petitioners failed to brief KCC 16.09 and KCC 17.12 under this issue. Therefore, they believe these two arguments are abandoned.

The Intervenors contend local governments can achieve a variety of rural densities and uses through "clustering, density transfer, design guidelines, conservation easements, and other innovative techniques..."[38] They argue this portion of the GMA "expressly grants local governments discretion in establishing the pattern of rural densities and uses."[39]

The Intervenors discuss each use allowed in the Agricultural-20 Zone that is addressed by the Petitioners in their brief, such as kennels, auctions, hospitals, museums and convalescent homes. According to the Intervenors, the Petitioners fail to understand rural and agricultural uses in the County. For instance, kennels are numerous in the agricultural zones because dogs are kept, raised and sold specifically to work with livestock; and museums, hospitals and larger buildings would be under the County's development regulations, which limit their size, and state regulations, which require permitting and new water rights. The Intervenors contend that KCC 17.29 A-20 Agricultural Zone is implemented in conjunction with the County's CP, development regulations, and other state regulations and, when taken together, do not allow urban uses in rural areas.

The Intervenors contend KCC 17.36, Planned Unit Developments, allows for local planning based on local circumstances and is intended by the County to be one of the tools it needs to meet the goals in the GMA. KCC 17.36 provides for a detailed preliminary development plan prior to approval of a PUD, and a final development plan. The

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[38] RCW 36.70A.070(5)(b).

[39] Intervenors' HOM brief at 16.

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Intervenors argue there is no mandatory minimum density required in lands designated for rural uses, but instead the GMA requires innovative land use management techniques, including PUD's.[40]

According to the Intervenors, the PUD ordinance must be read in conjunction with other state laws, including availability of water rights from the Department of Ecology (DOE).

Petitioners Reply:

The Petitioners did not respond to the Respondent's and Intervenors' briefs.

Board Analysis:

The Board agrees with the Intervenors concerning KCC 16.09 and KCC 17.12. It is not enough to just list the provisions in the issue statement. The Petitioners must address the provision(s) in their argument and, if they fail to do so, the provisions or issue is considered abandoned. The Petitioners failed to brief these two provisions in this issue and are therefore deemed abandoned.

The Board will examine KCC 17.29 A-20 Agriculture Zone and KCC 17.36 Planned Unit Development separately.

KCC 17.29 sets forth certain permitted and conditional uses in the A-20 or Agricultural Zone. The purpose stated in KCC 17.29 is to "...preserve fertile farmland from encroachment by nonagricultural land uses; and protect the rights and traditions of those engaged in agriculture."[41] According to KCC 17.29, a variety of agricultural-related uses are permitted outright and many other uses are allowed by conditional use, including those the Petitioners argue are not allowed in the rural zone. There is also the open-ended provision which allows "any use not listed which is nearly identical to a listed use, as judged by the administrative official..."[42]

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[40] RCW 36.70A.090.

[41] KCC 17.29.010

[42] KCC 17.29.020

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KCC 17.29 requires a lot size of 20 acres, but other than that restriction, KCC 17.29 fails to contain development standards or size-limitations for the conditional uses allowed, and fails to control an unlimited number of unknown uses that can be permitted through administrative decision. In *Vashon-Maury*[43], the CPSGMHB held that, although some uses may fall within the definition of urban growth, many uses may be permitted in the rural area, if they satisfy the test [44]and the county has adopted policies and regulations necessary to keep the use in the rural area from being incompatible with the character of the rural land use pattern.

The Board concludes, if the County has standards in place to keep intact rural character and limit the size of development, some of the uses might be permissible in the rural area, such as kennels and agricultural-related auctions and museums. However, that's not the case here. In this case, the County failed to provide the necessary standards and limitations in its regulations to ensure urban-type uses will not be conditionally permitted or administratively decided in the rural area. The County also failed to fulfill either of the criteria in the two-part test in *Vashon-Maury*, which this Board believes is a reasonable standard that can be used to help the Board make a decision in this matter.

KCC 17.36 is the County's Planned Unit Development Zone chapter. The Board agrees with the Petitioners this zone: (1) allows a variety of urban uses in the rural area; (2) fails to limit uses to those that serve the rural areas; (3) fails to include standards to protect rural character; (4) fails to comply with RCW 36.70A.070(5)(c); (5) fails to include any maximum density for the residential uses it allows in the rural areas; and (6) basically lacks appropriate standards to comply with the GMA.[45] KCC 17.36 does not specify which zones PUD's are allowed or under what specific criteria they will be permitted. In fact, it looks as though the PUD Zone is set up as its own independent zone, rather than a

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[43] Vashon-Maury v. King County, CPSGMHB Case No. 95-3-0008, FDO at 48, 1995 WL 903209 (Oct. 23, 1995).

[44] The test's two components that determine whether something is urban in nature and can be located in the rural area are (1) it is dependent on a rural location and it is compatible with the rural character OR (2) it is an EPF.

[45] Petitioners' HOM brief at 18-21.

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development option, as most other counties choose to do. The Kittitas Draft Proposed Zoning Map shows the PUD Zone located at Snoqualmie Pass and Vantage surrounded by the Forest and Range Zone, and possibly in some areas of the Commercial Agriculture Zone. The clarity of the map makes this determination inconclusive.

The Intervenors contend the use of PUDs is authorized by the GMA. The Board agrees. PUDs are one of the acceptable tools counties and cities can adopt in their development regulations, provided that standards and limitations are in place to ensure compliance with the GMA. The only restriction imposed by the County in this chapter is under KCC 17.36.025, Density, which provides, "[T]he overall density of any PUD residential development shall not exceed the density as allowed for in the underlying zone." Density is defined in the KCC as, "Expressed in dwelling units per acre." [46]

KCC 17.36 allows commercial uses, such as hotels, motels, restaurants, cafes, taverns and other businesses in the rural area. These uses are typically located in the urban growth areas or in LAMIRDs, not in rural areas. Permitting of the above mentioned commercial uses can't be determined in terms of "dwelling units per acre". These uses must have specific standards and limitations in order to prevent urban development in the rural area or not be allowed outside of established UGA's or LAMIRD's.

The Intervenors argue the PUD ordinance must be read in conjunction with other state laws. This is true, but the Board also believes a jurisdictions development regulations should be clear, detailed and concise. Pertinent state laws should be mentioned in the chapter, if applicable.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence the action of the County, complained of herein, is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds Kittitas County impermissibly allows urban uses in its

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[46] KCC 17.36.025.

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rural areas, and fails to include standards to protect the rural character as required by RCW 36.70A.020(1-2, 8-10), RCW 36.70A.070(5)(b) and RCW 36.70A.110(1). The Board finds Kittitas County Code Chapters 17.29 and 17.36 allow urban uses in the rural areas and fail to protect rural character and are not in compliance with the GMA.

The Board also finds the Petitioners failed to brief KCC 16.09 and KCC 17.12 and, therefore, these two provisions mentioned in this issue are deemed abandoned.

Issue No. 3:

Does Kittitas County's failure to prohibit urban uses in designated agricultural lands of long-term commercial significance in chapter 17.3 KCC violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, and 36.70A.177?

The Parties' Position:

Petitioners:

The Petitioners contend Kittitas County violates the GMA by allowing non-farm uses in designated agricultural lands of long-term commercial significance (ALOLTCS). Specifically, the County allows non-livestock auctions, quarries, sand and gravel excavation, kennels, day care centers, community clubhouses, governmental uses essential to residential neighborhoods, and schools with no limiting criteria or standards. The Petitioners agree the GMA provides counties with some discretion in the zoning of agricultural lands, but zoning techniques "should be designed to conserve agricultural lands and encourage the agricultural economy."[47]

The Petitioners contend the EWGMHB in *Ellensburg v. Kittitas County,* explicitly listed schools, hospitals, convalescent homes and day care facilities as examples of development incompatible with ALOLTCS.[48] In that case, the Board found that Kittitas County's ordinance failed to meet the minimum requirement of discouraging incompatible uses, similar to those at issue in this case. The Petitioners cite the *Lewis County* decision as an example where

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[47] RCW 36.70A.177(1).

[48] City of Ellensburg v. Kittitas County, EWGMHB Case No. 95-1-0009 at 6, 1996 (May 7, 1996).

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the Supreme Court determined that certain non-farm uses, such as mining and public facilities, could negatively impact resource lands and activities and substantially interfere with the GMA goal of maintaining and enhancing the agricultural industry. The Supreme Court found the Western Washington Growth Management Hearings Board's (Western Board) holding made sure the county's zoning methods actually were "designed to conserve agricultural lands and encourage the agricultural economy" as required by RCW 36.70A.177(1).[49] Other illegal uses disapproved of by the Supreme Court included utility facilities, schools, shops, prisons and airports. [50]

As for auction houses and mining activities, in *Dawes v. Mason County*,[51] the Western Board listed auction houses in rural areas as a prohibited use in rural areas, which, according to the Petitioners, clearly means agricultural land as well.[52] And, according to the Petitioners, mineral excavation is also an inappropriate activity in agricultural lands.[53] Lands desired for use for mineral excavation should first be designated by the County as mineral resource lands.

Respondent:

The Respondent argues this issue was already litigated in *Ellensburg v. Kittitas County,* and the County's list of permitted and conditional uses was what survived. The Respondent disagrees with the Petitioners' analysis of *Lewis County*. The Respondent contends the question under *Lewis County* was whether the non-agricultural uses in designated commercial agricultural lands "undermine the GMA mandate to conserve agricultural lands for the maintenance and enhancement of the farm industry."[54] The Respondent asks how a grange hall, a rural school, a rural volunteer fire department, or day

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[49] Lewis County, 157 Wn.2d at 507-508, 139 P.3d at 1105 footnote omitted.

[50] Id.

[51] Dawes v. Mason County, WWGMHB Case No. 96-2-0023, Order Finding Invalidity (Jan. 14, 1999).

[52] Petitioners' HOM brief at 23.

[53] Lewis County, Id.

[54] Lewis County, Id..

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care undermines the farm industry. According to the Respondent, most of these uses are conditional uses and, as such, subject to an intensive public hearing process to ensure compatibility with the rural area.

The Respondent also argues the Petitioners misstate the holding in *Dawes v. Mason County.* The Western Board said "[t]he matrix of permitted uses within rural lands...goes far beyond resource based uses", not that all uses in the matrix of uses were prohibited as the Petitioners suggest, but rather the list went beyond what would be permitted, or includes many that would not be permitted.[55] The Respondent contends auctions convenient for farmers are indeed resource-based uses which form an important part of the agricultural community.

In regards to sand and gravel excavation and stone quarries, the Respondent contends the KCC is being revised and will no longer allow these uses in the commercial agricultural lands. In the future, these uses will be designated as mineral lands of long-term significance.

Intervenors:

The Intervenors contend the Petitioners blur the distinction between urban uses, natural resource uses, and agricultural use, which the Intervenors say is not just farming.

The Intervenors argue there is no evidence mining permanently removes farm land from production, contending mining is a transitory use and the land can later be reclaimed. According to the Intervenors, the purpose of the agricultural lands designation is to protect and preserve rural character and the farm economy, not to limit agricultural uses.

The Intervenors contend the Petitioners fail to understand the assertion in *Lewis County* and argue that agriculture is more than just cropland. According to the Intervenors, the Petitioners also fail to brief the issues it identified and fails to identify specific incompatible urban uses allowed by the County on agricultural lands. The Intervenors also contend as evidence that the Petitioners fail to even attempt to review any of the criteria for

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[55] Dawes, Id.

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siting mineral facilities in the County and the County fails to consider impacts on agricultural lands.

Petitioners Reply:

The Petitioners argue they are correct in their analysis of *Lewis County*. In *Lewis County*, the Supreme Court invalidated the exclusion of farm homes and farm centers from the GMA requirement and approved of a prohibition on mining, and a variety of other uses, noting that "[s]erving the farmer's 'non-farm' economic needs is not a logical or permissible consideration in designating agricultural lands under the GMA."[56] The Supreme Court also "affirmed the (Western) Board's invalidation of non-farm uses within the agricultural lands," noting that all uses on agricultural lands must be in keeping with the GMA's mandate to conserve designated agricultural lands.[57]

The Petitioners argue certain uses are not farm uses, such as clubhouses, government buildings, and certain day care centers. They agree grange halls, some schools and maybe day care centers may be permissible, but the County failed to place provisions to limit the scope of these uses, allowing such non-agricultural activities as boarding schools of any size, community center complexes and athletic facilities, and any type of auction facility. Without criteria limiting these to agricultural-related uses, many inappropriate uses can be permitted in the County.

Board Analysis:

RCW 36.70A.170 requires counties and cities to designate and preserve agricultural land of long-term commercial significance.[58] Kittitas County has designated these lands. The Petitioners contend the County, in its development regulations, has authorized urban uses in these lands without the essential provisions in place to limit the scope of these uses so as to protect the agricultural lands. The County argues that RCW 36.70A.177, which allows a

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[56] Lewis County, Id.

[57] Id.. at 509.

[58] RCW 36.70A.170.

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variety of innovative zoning techniques in areas designated as ALOLTCS, permits the uses authorized in its development regulations either outright or by conditional use, and the authorized uses can be rural.

Under KCC 17.31.010, Purpose and Intent, the County recognizes the importance of the Commercial Agricultural Zone by stating "[T]he intent of this zoning classification is to preserve fertile farmland from encroachment by non-agricultural land uses and protect the rights and traditions of those engaged in agriculture."[59] Then the County, in KCC 17.31.020, Uses Permitted, and KCC 17.31.0030, Conditional Uses, allows a variety of uses which can be urban or rural, without limitations placed on these uses. Unfortunately, KCC 17.31 is void as to the scope and limitations of these uses, thus allowing unlimited discretion in permitting them. KCC 17.31 also allows quarries and sand and gravel mining operations. These activities remove the land from agricultural production for many years, if not forever.

The Board agrees with the Petitioners that the County needs to have written limitations on uses authorized by its development regulations in ALOLTCS, which is the County's Commercial Agricultural Zone. There are uses presently allowed by the County that may be appropriate for the ALOLTCS, if their scope and/or function are limited. Without specific criteria to limit inappropriate non-agricultural uses, the County's actions will substantially interfere with the GMA's mandate for conservation of ALOLTCS and have a negative impact on designated agricultural lands.

In *Lewis County*, the Court approved of the Western Board's holding that when looking at non-agricultural uses on agricultural lands the uses should be reviewed so as to show they are: (a) limited in ways to ensure no negative impact to resource lands and activities; and (b) do not substantially interfere with achieving the GMA goal of maintaining and enhancing the agricultural industry.[60] This Board subscribes to the Court's determination in *Lewis County* and encourages counties and cities to be specific in their

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[59] KCC Chapter 17.31.010.

[60] Lewis County, Id.

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development regulations to ensure compliance with the GMA.

The County should include standards and criteria for use on a case-by-case basis to determine whether permitting a use will result in a negative impact to resource lands and activities, and whether the use will maintain and enhance the agricultural industry. The methodology to determine these two criteria should be in the County's development regulations. Under the current regulations, a wide variety of non-agricultural uses can be permitted with no such analysis.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence the action of the County, complained of herein, is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds Kittitas County impermissibly allows urban uses on its agricultural lands of long-term significance, and fails to include standards within its development regulations to limit such uses and protect the commercial agricultural zone as encouraged and required by RCW's 36.70A.020(1, 8), 36.70A.060, 36.70A.070, and 36.70A.177. The Board also finds Kittitas County Code Chapter 17.31 allows urban uses in the rural areas, fails to protect rural character, and is not in compliance with the GMA.

Issue No. 4:

Does Kittitas County's failure to require that all land within a common ownership or scheme of development be included within one application for a division of land (KCC 16.04) violate RCW 36.70A.020 (6, 8, 10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.130, and 36.70A.177?

The Parties' Position:

Petitioners:

The Petitioners contend Kittitas County's subdivision code allows property owners to divide applications for short subdivisions and short plats, and long subdivisions and long plats, amongst numerous applications, even if all the property is part of one development. The Board addressed this issue in Case No. 07-1-0004c and concluded the "Kittitas County

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Code Title 16 needs review to ensure water quality and quantity is protected as required by the GMA."[61] The Petitioners believe this ruling was well-founded and should be applied to the County's new development regulations as well. New evidence from the DOE detailing the problems with the County's water supply and exempt wells has been submitted by the Petitioners.[62]

The Petitioners contend KCC 16.04 applies to all subdivisions of land, but there are no requirements for an entire development to be submitted at one time. Instead, a property may be subdivided, and then re-divided again with separate applications. The effect, according to the Petitioners, is to allow developers to skirt the GMA's mandate to preserve water quality by allowing multiple exempt wells for one residential subdivision and cite to *Kathy Moitke and Neighborhood Alliance of Spokane v. Spokane County,*[63] which requires the County to protect water quality, and *Dept. of Ecology v. Campbell & Gwinn LLC*[64], where the court determined that a developer may not draw more than 5,000 gallons of well water per day per subdivision without a permit.

The Petitioners contend the County is facing a water shortage and base this on a DOE study.[65] Furthermore, excessive withdrawal of ground water can adversely affect surface and ground water quality. One study shows the Yakima River Basin appears to already have surface water contamination by ground water contaminant flow.

The Petitioners argue the water problems in Kittitas County are significant. The DOE reviewed the County's SEPA documents and found that 75% of the 10 to 14 lot developments in the County were from developers and land owners with multiple

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[61] Kittitas County Conservation et al., v. Kittitas County, EWGMHB Case No. 07-1-0004c, FDO (Aug. 20, 2007).

[62] Letter from Department of Ecology, Kittitas Development Draft pp. 2-3 (Nov. 2006).

[63] Kathy Moitke and Neighborhood Alliance of Spokane v. Spokane County, EWGMHB Case No. 05-1-0007, FDO (Feb. 14, 2006).

[64] Dept. of Ecology v. Campbell & Gwinn LLC, 146 Wn.2d 1, 43.P.3d 4 (2002).

[65] Letter from Dept. of Ecology, Kittitas County Development Draft pp. 2-3 (Nov. 2006).

developments.[66] According to the Petitioners, over two days, 56 residences divided into four applications were proposed by a single developer, with at least four exempt wells.[67]The Petitioners contend the County is allowing developers to structure subdivision applications in an attempt to skirt the holding of *Department of Ecology v. Campbell & Gwinn* and the GMA's mandate to conserve water quality.

Respondent:

The Respondent contends the County has worked cooperatively with the DOE and a cumulative SEPA analysis is done where appropriate. The Respondent argues the well and water issues brought forth by the Petitioners are within the jurisdiction of the DOE, not the County. The Respondent then proceeds to present the County's actions concerning Pine View Estates to counter the Petitioners argument that the County fails to engage in cumulative review of projects. The Respondent argues that Exhibits "E", "F" and "G" show the County's efforts to review related projects.

Intervenors:

The Intervenors contend there is not a "scintilla of analysis" as to how KCC 16.04 violates any of the GMA provisions produced by the Petitioners.[68] Instead, the Intervenors claim the Petitioners are really arguing that KCC 16.04 violates the Supreme Court's decision in *Department of Ecology v. Campbell & Gwinn*.

According to the Intervenors, the Hearings Boards do not have subject matter jurisdiction to determine whether KCC 16.04 is inconsistent with the Court's holding in *Campbell & Gwinn*, and there is no provision in the GMA which requires all land within a common ownership or scheme of development to be included within an application for a division of land. If the Petitioners choose to challenge individual developments for failing to comply with RCW 90.44 or *Campbell & Gwinn*, then they must do so in Superior Court, not

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[66] Id.

[67] Petitioners' HOM brief at 26 citing to Id.

[68] Intervenors' HOM brief at 22.

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before the Hearings Boards.

With regards to the Petitioners' claim that KCC 16.04 violates the GMA, the Intervenors argue the Petitioners provide no analysis how this actually violates the GMA provisions, except the GMA "commands that Kittitas County adequately protect water quality, and consider the impact of developments on capital facilities."[69]

Petitioners Reply:

The Petitioners contend KCC 16.04 is deficient because it does not require all development applications to identify land in common ownership, nor does it require staff to handle proposals cumulatively. According to the Petitioners, their example where 56 residences divided into four applications were proposed by a single developer over two days clearly shows a County regulation is needed. The Petitioners contend by requiring project applicants to identify all related projects and requiring County staff to review related projects for cumulative impacts, the County will prevent application problems in the future.

The Petitioners argue the GMA commands the County to protect water quality and ground water resources,[70] yet the County's procedure of allowing developments to be submitted separately creates the problem addressed in this issue, not the DOE's permitting process. According to the Petitioners, the wells are exempt from DOE's regulation because these are exempt wells.

Board Analysis:

The Board has jurisdiction on this issue based on RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv), which direct the County to protect the environment and enhance the state's high quality of life, including water quality and quantity, whether found as a surface or ground water resource. The question is whether KCC 16.04 adequately protects water quality and quantity as required by the GMA when this chapter provision allows multiple divisions of commonly owned property which will permit multiple new wells exempt from

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[69] Petitioners' HOM brief at 25.

[70] RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv).

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the DOE's regulations.

The Board agrees with the Petitioners that the County's subdivision regulations allow multiple subdivisions side-by-side, in common ownership, which then can use multiple exempt wells This is contrary to the GMA's requirements to protect water quality and quantity. The County's exhibits "E", "F" and "G" indicate it is catching some of the applications in common ownership and requiring SEPA review of the cumulative impacts, but this is ineffective and will lead to errors. A mandatory cumulative evaluation requirement in the code is the first step to ensuring the County would reduce permitting errors and include all applications with common ownership.

The DOE has authority over exempt wells, but the County has authority over land use decisions and planning, which serves to support and supplement DOE's regulations. Although DOE is the ultimate authority on just how a permit for an exempt well is obtained, the County still controls its own ground/surface water and the GMA requires protection of these resources. Given these roles within water resource management, the County's development regulations are important in that they can limit the impact on water resources by requiring a developer seeking application approval to demonstrate that the proposed development will not adversely impact ground/surface waters. Simply stating the DOE exempts the well does not remove the responsibility of the County to protect water quality and quantity as required by the GMA.

Also, as correctly stated by the Petitioners, SEPA can supplement, but it cannot substitute for GMA regulations, which require measures to control rural development to protect water resources.[71] The DOE's strongly worded letter on the Kittitas Development Draft expresses deep concern over "the adequate long term water supply for municipal use by developments and protecting senior water rights in an adjudicated basin."[72] Even though this statement pertains to the Cle Elum vicinity in particular, the DOE indicated additional

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[71] RCW 36.70A.070(5)(c)(iv).

[72] Letter from Dept. of Ecology, Kittitas County Development Draft (Nov. 2006).

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concerns over a number of subdivisions which did not use groundwater exemptions according to the Court's determination in *Campbell & Gwinn*. The DOE's letter went on to say, "...Kittitas County continues to make land use decisions contrary to Ecology's concerns and SEPA recommendations."[73] Furthermore, Ecology felt strongly enough about the County's "consistent disregard of Ecology's commitment to meet current water needs, ensure water availability for people, fish and natural environment" that the DOE pointed out the County's action "diminishes Ecology's goals and objectives to work with communities and citizens to provide effective water management."[74]

As stated by the Board earlier in this order, the County needs to have regulations in its code that are clear, detailed and concise, to ensure public understanding and compliance. The County continues to be aware of the problems with its subdivision laws, but fails to have adequate protections in place for water quality and quantity as required by the GMA and recommended by the DOE.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence the action of the County, complained of herein, is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds Kittitas County's KCC 16.04 fails to protect water quality and quantity as required by RCW's 36.70A.020(10) and 36.70A.070(5)(c)(iv).

Issue No. 5:

Does Kittitas County's failure to prohibit urban governmental services outside of urban growth areas or LAMIRDs violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.110, and 36.70A.130?

Conclusion:

The Petitioners have failed to brief this issue and the Board has determined this issue

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[73] Id.

[74] Id.

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is abandoned.

Issue No. 6:

Does Kittitas County's failure in chapter 17.32, 17.40, and 17.44 KCC to have any guidelines for location of the Highway Commercial Zone and standards to protect the rural area violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, and 36.70A.177?

The Parties' Position:

Petitioners:

The Petitioners contend the County's Highway Commercial Zone fails to have restrictions in the County's development regulations or CP as to where these zones may be placed. As discussed in Issue No. 2, the Petitioners argue the County must protect rural character and restrict urban growth and urban uses to urban growth areas. Currently, the Highway Commercial Zone is allowed anywhere in the County provided the zone abuts a public street.[75] According to the Petitioners, the County must enact restrictions on placement, uses, size, scale and appearance which protect rural character and serve rural residents, and cites the Court of Appeals decision in *Timberlake Christian Fellowship v. King County*, as authority.[76]

The Petitioners contend the County's Highway Commercial Zone fails to contain any of the criteria or limitations required by RCW 36.70A.070(5) and it allows urban development contrary to RCW 36.70A.070(5) and RCW 36.70A.110(1). The Petitioners also argue the County's Limited Commercial Zone, KCC 17.32, and General Commercial Zone, KCC 17.40, both suffer from the same defects.

Respondent:

The Respondent argues the County's Highway Commercial Zone has restrictions on size and location. According to the Respondent, the maximum size and height of an allowed

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[75] KCC 17.44.080.

[76] Timberlake Christian Fellowship v. King County, 114 Wn. App. 174, 184-85, 61 P.3d 332, 337-38 (2002).

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structure is 4,000 square feet and not more than 35 feet in height.[77] The Respondent also contends there is also a requirement the commercial nature be geared toward local uses or uses within the vicinity.

Intervenors:

Intervenors adopt the Respondent's briefing on this issue.

Petitioners Reply:

The Petitioners argue KCC 17.44 must limit future applications of the Highway Commercial Zone to appropriate locations and limit uses to those which serve the rural areas.

Board Analysis:

The Board agrees with the Petitioners that KCC 17.44 Highway Commercial Zone, fails to prohibit urban commercial uses from being located almost anywhere in the County where the proposed businesses "abut a public street, or shall have such other access as deemed suitable by the board."[78] In other words, the Highway Commercial Zone is not limited in any reasonable way to comply with RCW 36.70A.070(5) and RCW 36.70A.110(1).

The County's purpose and intent of the Highway Commercial Zone is to "provide for motorist-tourist dependent businesses having little interdependence and requiring convenient access to passing traffic."[79] The County limits the height of the buildings to 35 feet, but contrary to the County's assertion that "[G]uidelines exist to limit the size of the structure to under 4,000 sq. ft.", only grocery stores are limited in size to 4,000 square feet in KCC 17.44.[80] All other commercial uses are not limited in size and the County allows "[A]ny use not listed which is nearly identical to a permitted use, as judged by the administrative official" to be permitted. There is also no requirement in the chapter that the

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[77] KCC 17.44.020; KCC 17.44.060.

[78] Id.

[79] Id.

[80] Respondent HOM at 8.

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"commercial nature be geared toward local uses or uses within the vicinity," as argued by the Respondent.[81]

The Highway Commercial Zone is primarily intended by the County to be placed in the rural areas where uses are required by the GMA to be "not characterized by urban growth and that are consistent with rural character."[82] RCW 36.70A.070(5) requires counties and cities to "include a rural element including lands that are not designated for urban growth..." [83]The KCC 17.44 fails to prevent this requirement and the requirements found in RCW 36.70A.070(5)(c)(i), (ii), and (iii). For all intents and purposes, the County's Highway Commercial Zone has characteristics similar to a LAMIRD [RCW 36.70A.070(5)(d)] and should be designated as such.

The Limited Commercial Zone, KCC 17.32, and the General Commercial zone, KCC 17.40, are found on the Official County Map, which defines their location in the County.[84] It appears the Limited Commercial Zone is found within the Ellensburg and Cle Elum proposed UGA expansions and the Thorp Urban Growth Node (UGN). KCC 17.40 General Commercial Zone is located in the Easton, Ronald, Vantage and Thorp UGNs.

The Board in Case No. 07-1-0004c found the expanded UGAs around Ellensburg and Kittitas, and the designation of UGNs out of compliance. In its Conclusion, the Board stated:

> The Petitioners have carried their burden of proof and shown the County's actions are clearly erroneous. This issue is remanded with directions for the County to designate the communities of Easton, Ronald, Snoqualmie Pass, Thorp, and Vantage consistent with the GMA. Further the County is out of compliance with the GMA by failing to conduct a proper land quantity analysis to determine the appropriate size of the UGA, and the County did not provide an updated Capital Facilities Plan to accommodate the UGA expansions for the City of Kittitas and for the City of Ellensburg. Such expansions are out of compliance. This issue is remanded with directions for the County to conduct a proper land quantity analysis and an updated CFP in compliance with the

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[81] Ibid.

[82] RCW 36.70A.070(5)(b).

[83] RCW 36.70A.070(5).

[84] KCC 17.12.020

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GMA and to show the work done.[85]

The County is working on changing its UGN designation to comply with the GMA and is no longer planning to expand the Ellensburg UGA, but has not yet completed that work. In its proposal, the County states:

> **Elimination of Urban Growth Nodes**
> Remove the UGN designation and revert to Rural Land Use Designation and rural zones. Intend to continue subarea plans for each UGN area, which could result in either rural or Limited Areas of More Intense Rural Development (LAMIRD) in the future.[86]

The following chart indicates where the Highway, Limited and General Commercial zones are located in the County and the zones past, present and future land use.[87]

Name	Ltd Com	Gen Com	Hwy Com	CZ	CLU	PZ	PLU	UGN
Ellensburg UGA	Outside UGA			Ltd Com	Ltd Com	Com	?	No
Kittitas UGA								No
Cle Elum UGA	Outside UGA			R-10; R-Res	Ltd Com	Com	Rural	No
Thorp	Yes	Yes	Yes	Gen Com	Com	All	Com	Yes
Ronald		Yes		Gen Com	Urban Res	Gen Com	Rural	Yes
Snoqualmie			Yes	Hwy Com	Hwy Com	Hwy Com	Hwy Com	Yes
Easton		Yes		Gen Com	Com	Gen Com	Com	Yes
Vantage		Yes		Gen Com	Rural	Gen Com	Com	?

Ltd Com - Limited Commercial zone

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[85] Kittitas Co. Conservation et al., v. Kittitas County, EWGMHB Case No. 07-1-0004c, FDO p. 37 (Aug. 20, 2007).

[86] Kittitas County Planning Dept. UGN Handout, Dec. 10, 2007

[87] Created by the Board from the Official Kittitas County Zoning Map.

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Gen Com	- General Commercial zone
Hwy Com	- Highway Commercial zone
CZ	- Current zoning
CLU	- Current land use
PZ	- Projected zoning
PLU	- Projected land use
UGN	- In or out of Urban Growth Node

Both KCC 17.32 Limited Commercial Zone, and KCC 17.40 General Commercial Zone, should be limited to UGAs or LAMIRDs in the KCC. At this time, only the General Commercial Zone specifies this zone is to "provide a classification consistent with existing business districts in unincorporated towns (i.e. Vantage, Easton) where a wide range of community retail shops and services are available."[88] The Purpose and Intent statement under KCC 17.40 seems to indicate this zone is limited to designated urban growth areas, but until the County comes into compliance with the Board's Order in Case No. 07-1-0004c, the General Commercial Zone fails to comply with the land use.

The Limited Commercial Zone specifies "[T]he minimum lot size for all dwelling units shall meet the requirements of the residential district."[89] This statement is found under lot size requirements and seems to limit the location of this zone to UGAs, but this zone is currently found only in UGNs, which are out of compliance pursuant to the Board's FDO in 07-1-0004c.

The Petitioners are correct in their evaluation that both the Limited Commercial and General Commercial zones have few, if any, siting limitations or building standards. The County's Limited Commercial Zone has some limitations, but the General Commercial Zone fails to have any limitations whatsoever as to lot size, maximum lot coverage, floor area, yard setback requirements or building height. Without such limitations, a commercial structure of unlimited floor area or height could be constructed in this zone.

The County's Limited Commercial and General Commercial zones are currently

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[88] KCC 17.40.010.

[89] KCC 17.32.030.

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located in the expanded UGA of Ellensburg, outside the town of Cle Elum, and in various UGNs. The City of Ellensburg's expanded UGA has been withdrawn and the County is currently re-designating UGNs to comply with the GMA and the Board's FDO in 07-1-0004c. Until these actions are completed by the County, KCC 17.32, Limited Commercial, and KCC 17.40, General Commercial, are out of compliance with the GMA.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence the action of the County in adopting KCC 17.44, KCC 17.32, and KCC 17.40 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds Kittitas County's KCC 17.44, KCC 17.32 and KCC 17.40 fail to protect the rural area as required by RCW's 36.70A.020(1-2, 12), 36.70A.070, and 36.70A.110.

Issue No. 7:

Does Kittitas County's failure to require GMA-compliant rural and resource land densities when parcels are subdivided through the County's "onetime split" process in chapters 17.29 and 17.31 KCC violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, and 36.70A.177?

The Parties' Position:

Petitioners:

The Petitioners argue the County allows property owners to create a one-time split of their properties zoned Commercial Agriculture or Agriculture-20, which allows property owners to divide their properties below density levels approved by the GMA.

For clarity, the Agriculture-20 zone, in KCC 17.29.040, provides:

> Minimum lot (homesite) requirements in the agricultural (A-20) zone are: Twenty acres for any lot or parcel created after the adoption of the ordinance codified in this chapter, **except that one smaller lot may be divided off any legal lot; provided such parent lot is at least eight acres in size**; and provided, that such divisions are in compliance with all other county regulations (e.g., on-site septic system). Parcels must be located within the Agriculture-20 zone at the date of the adoption of this code. Once this

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> provision has been applied to create a new parcel, it shall not be allowed for future parcel subdivision, while designated commercial agricultural zone. Onetime splits shall be completed via the short plat process. The onetime parcel split provision should be encouraged where it is adjacent to ongoing commercial agricultural practices, especially since the intent of this provision is to encourage the development of homesite acreage rather than removing commercial agricultural lands out of production. (Emphasis added).[90]

The Petitioners contend, even though KCC 17.29.040 and KCC 17.31.040 place limitations on the size of the "parent" lot, there are no minimum lot sizes on the other one-time split parcel. This lack of minimum lot sizes, the Petitioners claim, allows building lots of any size, including lots less than one acre, and violates the GMA.[91]

The same argument can be applied to the County's Commercial Agricultural Zone, or ALOLTCS, which also requires a minimum lot size of 20 acres.[92] According to the Petitioners, the County is required to adopt development regulations to protect agricultural lands of long-term commercial significance.[93] The Petitioners cite *City of Moses Lake v. Grant County* as an example where this Board has upheld a 40-acre minimum lot size as appropriate to protect "farmland from loss or damage."[94] The Petitioners also cite the Supreme Court's *Lewis County* case to show certain development violates the GMA when it fails to "conserve agricultural prime soils and [to] prevent residential densities inconsistent with agriculture."[95]

The Petitioners contend the effects of a one-time split are two-fold: (1) a split removes farmland from production and allows non-farm development adjacent to viable farming operations and; (2) a split fails to conserve agricultural lands by taking the acreage out of production and allowing non-compatible uses on existing farms.

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[90] KCC 17.29.040.

[91] Petitioners HOM brief at 29.

[92] Id.

[93] RCW 36.70A.040(4)(b).

[94] City of Moses Lake v. Grant Co., EWGMHB Case No. 99-1-0016, Order on Pet. Motion for Reconsideration, p.4 (Aug. 16, 2000).

[95] Lewis County, 157 Wn.2d at 507-508, 139 P.3d at 1105.

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According to the Petitioners, the County fails to require a minimum lot size for the one-time split parcels and fails to require buffers between the split parcel and adjoining agricultural land. In addition, the Petitioners contend there is no requirement the split parcel shall be used for the farmer owner or operator for a residence. In other words, the Petitioners argue, it could be for the purpose of selling real estate for home construction, thus allowing two residences on what should be one parcel.

Respondent:

The Respondent contends the one-time split will never result in a greater density than what the County identifies as rural and the lot will not be allowed to be split off from a parcel smaller than eight acres. The reason given by the County for one-time splits is to "minimize the impact upon rural and agricultural lands."[96] The Respondent argues the newly split off lot and the remaining parent parcel would be at least two lots on eight acres.

Intervenors:

The Intervenors contend the Petitioners are attempting to shift the burden to the County to prove both rural character and conservation of farmland requires a prohibition of the local option known as the "one-time" split".[97] The Intervenors argue the Petitioners fail to provide evidence the County's provisions fail to meet their stated purpose, which is to avoid "removing commercial agricultural lands out of production."[98] The one-time split, according to the Intervenors, results in a variety of lot sizes consistent with rural character and the traditional rural landscape.

The Intervenors contend the Petitioners claim any resultant one-acre parcel is below the density threshold for rural lands, contrary to RCW 36.70A.177(2)(b), the cluster zoning provision. But according to the Intervenors, the GMA does not reject the one-time split; does not reject small-lot home sites of one acre when tied to a larger parent parcel; does

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[96] Respondent HOM brief at 8.

[97] KCC 17.29.040 and KCC 17.31.040.

[98] Id.

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not say how large or small the parent parcel must be; and does not reject density averages achieved by innovative techniques, like the one-time split. Accordingly, the Intervenors argue the Petitioners have their personal preferences on how to achieve the GMA goals and the County has its preferences, but the County requires deference according to the GMA. In *City of Arlington v. CPSGMHB*, the court determined the Board shifted the burden back to the County to "justify" a decision.[99] According to the Intervenors, all the parties involved in this case, and this Board, have stated accurately that the decisions made by local government are entitled to a presumption of validity. The one-time split fulfills this requirement and is authorized by the GMA.

Petitioners Reply:

The Petitioners contend the one-time split provision violates RCW 36.70A.177. According to the Petitioners, this statute is limited to "areas designated as agricultural lands of long-term commercial significance under RCW 36.70A.170."[100] The County's one-time split provision applies to both rural and agricultural land, which limits the Intervenors' argument to only half of the problem. In addition, RCW 36.70A.177(d) allows the innovative technique of "quarter/quarter zoning", which permits one residential dwelling on a one-acre minimum lot for each one-sixteenth of a section of land."[101] The Intervenors, according to the Petitioners, argue this provision permits the County's one-time split on agricultural land. However, the Petitioners contend, RCW 36.70A.177 requires "one-sixteenth of a section of land" or 40 acres, before a split is authorized.[102] The County allows one-time splits on parcels as small as eight acres.

The Petitioners argue RCW 36.70A.177 allows only "one residential dwelling" for each "one-sixteenth of a section of land", whereas the County allows two residential

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[99] City of Arlington v. CPSGMHB, WA App. __,154 P.3d 936 (2007).

[100] RCW 36.70A.177.

[101] Id.

[102] Id.

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dwellings.[103] The Petitioners also contend the County fails to require a minimum lot size to prevent conflict between residential and farming activities. The Petitioners cite the Supreme Court's decision in *Lewis County* concerning RCW 36.70A.177, which said, "...counties may choose how best to conserve designated lands as long as their methods are 'designed to conserve agricultural lands and encourage the agricultural economy."[104]

Board Analysis:

The Petitioners are only addressing KCC 17.29, Agriculture Zone, and KCC 17.31, Commercial Agriculture Zone, listed in this issue. The County's stated purpose and intent of these two zones is to "...preserve fertile farmland from encroachment by non-agricultural land uses; and protect the rights and traditions of those engaged in agriculture."[105] The minimum lot size in both zones is 20 acres, but both zones allow a small lot, one-time division or split. The question for the Board is whether the GMA authorizes a small lot division under the limited regulations and circumstances provided by the County in these two agricultural zones.

The GMA addresses agricultural lands in a number of provisions. RCW 36.70A.020(2) Reduce sprawl, requires counties and cities to reduce sprawl by reducing the inappropriate conversion of undeveloped land, while RCW 36.70A.020(8) Natural resource industries, encourages counties and cities to conserve "agricultural lands, and discourage incompatible uses."[106] Increasing density in designated agricultural lands, on its face, fails to conserve large tracts of farmland.

RCW 36.70.040(4) requires local governments to designate and conserve agricultural land to assure the maintenance and enhancement of the agricultural resource industry.

RCW 36.70A.060 requires counties to adopt development regulations that "assure that the use of lands adjacent to agriculture... shall not interfere with the continued use, in

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[103] Id.

[104] Lewis County, 157 Wn.2d at 506-507, 139 P.3d at 1105.

[105] KCC 17.29 and KCC 17.31.

[106] RCW 36.70A.020(8).

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the accustomed manner and in accordance with best management practices."[107] Here, again, a one-time, small lot split, which can be sold and used for non-farm related purposes, may interfere with the adjacent farming practices. Without County standards or limitations in place to protect farming activities, conflict between land owners may occur.

RCW 36.70A.070(5)(a) requires counties to "develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter."[108] As determined in another issue in this petition, the County has failed to provide this written record, and thus fails to explain how a one-time split in the two agricultural zones, which are part of the County's rural element, harmonizes the planning goals, specifically RCW 36.70A.020(8).

In addition, RCW 36.70A.070(5)(b), authorizes counties to use innovative techniques, such as clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character."[109] This statute authorizes innovative techniques, perhaps a technique such as the one-time split, when establishing a variety of rural densities and uses. However, the answer is in the details found in RCW 36.70A.177.

To determine whether the County's provisions and one-time split are acceptable innovative techniques allowed in the two agricultural zones as the County contends, the Board looks to the statute's intent. RCW 36.70A.177 authorizes a county to use "...a variety of innovative zoning techniques in areas designated as agricultural lands of long-term commercial significance under RCW 36.70A.170."[110] This provision is only addressing the County's Commercial Agricultural Zone. The statute gives the County the authority to use the innovative techniques listed under subsection (2)(a-e), other innovative techniques. The

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[107] RCW 36.70A.060(1).

[108] RCW 36.70A.070(5)(a).

[109] RCW 36.70A.070(5)(b).

[110] RCW 36.70A.177(1).

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County can develop its own techniques as long as it conforms to the GMA. Not one of the listed innovative techniques in RCW 36.70A.177(2), however, fit the County's one-time split provision under its adopted development regulations, including (2)(c) Cluster zoning or (2)(d) Quarter/quarter zoning. In addition, RCW 36.70A.177 encourages counties to limit non-agricultural uses to lands with poor soils or otherwise not suitable for agricultural purposes. The County's development regulations are inadequate to prevent prime agricultural land from being lost to small, one-time lot divisions.

The Board agrees with the Petitioners. The County's development regulations concerning one-time splits are inadequate to protect agricultural land, and its innovative technique of a one-time split allows two residential dwellings in the Agricultural-20 zone and Commercial Agriculture zone, essentially doubling the density allowed in the zones. The County's development regulations also fail in light of the Supreme Court's *Lewis County* decision. The Board agrees with the County that a one-time split may be an allowable "innovative technique", but only if it conforms to the GMA statutes mentioned, does not exceed the permitted density, or create non-conforming lots.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence the action of the County in adopting KCC 17.29 and KCC 17.31 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds the above mentioned Kittitas County chapters fail to protect the agricultural area as required by RCW's 36.70A.020(8), 36.70A.070(5)(a) and (b), and 36.70A.177 and is not in compliance with the GMA.

Issue No. 8:

Does Kittitas County's failure to revise chapter 17.58 KCC (airport zone uses) to avoid land uses that concentrate people, including either prohibiting residential uses, or limiting them to one dwelling unit per five acres within airport safety zones comply with RCW 36.70A.020 (3, 5, 12), 36.70A.070, 36.70A.110, 36.70A.130, and 36.70A.510?

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The Parties' Position:

Petitioners:

The Petitioners contend the County violates the GMA by allowing residential uses at improper densities in airport zones and cite RCW 36.70.547 as the requirement for counties and cities to "...discourage the siting of incompatible uses adjacent to such general aviation airport."[111] Furthermore, the Petitioners argue that airports are considered Essential Public Facilities (EPF) under the GMA,[112] and RCW 36.70A.200(2) provides that neither a comprehensive plan nor a development regulation may preclude the siting of public facilities. The Petitioners also contend the siting of high-density residential development adjacent to the airport has been recognized by the Hearings Boards as inappropriate and incompatible.[113]

The Petitioners then paraphrase WSDOT Aviation Division's recommendations and concerns for incompatible development near airports and submit a chart comparing the County's development restrictions on airport zone development and the Aviation Division's recommendations.[114] The Petitioners contend the County's failure to limit residential development in the runway protection zone is particularly egregious, since this zone is where many aircraft accidents occur. According to the Petitioners, the County's failure to limit residential development according to these guidelines violates the GMA's requirement that airports be protected as EPF's. The Petitioners are careful to point out they are challenging the County's regulations for all of the County's general aviation airports, not just Bowers Field, which was at issue in Intervenor Son Vida II's previous action before this Board.

Respondent:

The Respondent contends the level of development allowed in Kittitas County in the

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[111] RCW 36.70.547 incorporated into the GMA by RCW 36.70A.510.

[112] Citing Achen et.al., Clark County et al., WWGMHB Case No. 95-2-0067, FDO at pp. 190-193 (Sept. 20, 1995).

[113] Citing Son Vida II v. Kittitas County, EWGMHB Case No. 01-1-0017, FDO at pp. 8-10 (Jan. 23, 1998).

[114] Petitioners HOM brief at pp. 33-34.

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airport overlay zone is within the guidelines formulated by WSDOT. The Respondent points to Exhibits "H", "I", and "J" as examples of the County's correspondence with WSDOT and the County's compliance with its own development regulations.

Intervenors:

The Intervenors adopt by reference the separate brief of Intervenor Son Vida II. They also contend the Eastern Board previously found the County's Airport Overlay Zone, KCC 17.58, GMA compliant in *Son Vida II v. Kittitas County*.[115]

Intervenor Son Vida II:

Son Vida II argues the Board has already decided Issue No. 8 in a former Kittitas County case, *Son Vida II v. Kittitas County*, and the issue should be dismissed under the *Doctrine of Stare Decisis*.[116]

Son Vida II contends KCC 17.58 complies with the GMA for several reasons: (1) the Eastern Board already concluded the Airport Overlay Zone and densities within the zone comply with the GMA (Son Vida II references the letter from CTED to the City of Ellensburg); and (2) the Eastern Board found the land use controls, such as structures, density, and activities, in *Son Vida II v. Kittitas County,* to be GMA compliant and references WSDOT Aviation Division's report.[117]

Son Vida II argues that WSDOT Aviation Division's suggested accident safety zones, as opposed to those adopted by Kittitas County, are "very similar", and Son Vida II claims the risk matrix submitted by the Petitioners is only part of WSDOT Aviation Division's original matrix. [118] Furthermore, Son Vida II argues the very agency that wrote the report the Petitioners rely on found the City of Ellensburg and the County's original ordinance "an exemplary land use model".[119]

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[115] Id citation 74.

[116] Floyd v. Dept. of Labor & Industries, 44 Wn.2d 560, 565, 296 P.2d 563 (1954).

[117] Airports and Compatible Land Use, Vol. 1, WSDOT Aviation Division, Feb., 1999. Exh. 22G

[118] Son Vida II's HOM brief at 8.

[119] WSDOT Aviation Division letter to City of Ellensburg, June, 2001.

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In their conclusion, Son Vida II contends the Board should determine this issue has been heard before and decided in *Son Vida II v. Kittitas County*. The decision in that case was that the County's ordinance was GMA compliant and, according to Son Vida II, nothing has changed that would make KCC 17.58 non-compliant.

Petitioners Reply:

The Petitioners point out the County and Son Vida II are mistaken as to WSDOT Aviation Division's technical recommendations, one of which was to "...revise existing airport overlay zone as suggested (see attached) and apply to all public-use airports in Kittitas County."[120] WSDOT Aviation Division's attachment concerned Easton State airport and noted the suggested residential density ranges were being exceeded by the County.

The Petitioners contend a citation by Son Vida II from a June 2001, letter from WSDOT Aviation Division is out-of-date. In 2006, according to the Petitioners, WSDOT Aviation Division was recommending changes to the Kittitas County ordinance, indicating either the science changed or the Aviation Division reconsidered its 2001 assessment. The Petitioners argue, and Son Vida II concedes, the County's mandate is to comply with the GMA, not with WSDOT Aviation Division's opinion.[121]

The Petitioners contend they have shown significant differences between WSDOT Aviation Division's recommendations and the County's Airport Overlay District.[122] One key area highlights the magnitude of the difference. According to the Petitioners, the County fails to provide residential density limitations in the Runway Protection Zone, which is the zone directly at the end of the runway and, an area which WSDOT Aviation Division recommends residential use not be permitted.[123]

The Petitioners contend Son Vida II's argument regarding balancing the goals of the GMA is unpersuasive. The Petitioners argue that protecting Bowers Field and the other

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[120] Exhibit J to County's Response brief.

[121] Son Vida II's HOM brief at 7.

[122] Petitioners HOM brief at 31-34.

[123] Table at Petitioners HOM brief at 33.

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County airfields does not interfere with the other GMA goals. Son Vida II, according to the Petitioners, has focused on the GMA goals and the alleged elevation of one goal over the others by the Petitioners, when they should have focused on the GMA's requirements. The Petitioners point to the Supreme Court's decision in *Lewis County*, which held if a GMA goal and a specific GMA requirement conflict, the requirement controls.[124]

As to the issue of *stare decisis*, the Petitioners argue both the legal issue and the facts between this case and Case No. 01-1-0017 are different and *stare decisis* should not control in the case. The Petitioners contend the Hearings Boards are expected to rule consistently on issues presented to it, resolve only legal issues as presented, and not issue advisory opinions on matters not included in petitions for review. Although this Board declared the Airport Overlay Zone GMA-compliant in Case No. 01-1-0017, according to the Petitioners, the Board's finding is only relevant to the legal issue posed by Son Vida II in that case. The Petitioners contend this matter poses a very different question and the factual record is also different. The Petitioners also argue the prior case only dealt with one of the general aviation airports in the County and this current appeal addresses all of the County's general aviation airports.

Board Analysis:

Stare Decisis:

The Board will address the issue of *stare decisis* first. This doctrine was developed by the courts to accomplish stability in court-made law, but it is not an absolute impediment to change. *Stare decisis* in legal terminology means precedent shall be followed, however, the doctrine is limited. In *Floyd v. Dept. of Labor & Industries*, the Supreme Court said, "[T]he doctrine means no more than the rule laid down in a particular case is applicable only to the facts in that particular case or to another case involving identical or substantially similar facts."[125] In *Vergeyle v. Employment Security Department*, the Court of Appeals stated that, "*stare decisis* plays only a limited role in the administrative agency context (but) agencies should strive for equality of treatment."[126]This Board is required to make their decision based on the issues

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[124] Lewis County v. WWGMHB, 157 Wn.2d 488, 504, 139 P.3d 1096, 1104 (2006).

[125]Ibid citation 76. *Floyd* at 565.

[126] *Vergeyle v. Employment Security Dept.*, 28 Wn.App. 399 at p. 404 (1981).

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presented and the facts developed. The facts of each case stem from the Record, which represents the information before the legislative body when making its determination, the arguments made by the parties' in their briefs, and any supplemental evidence which the Board deemed necessary or of substantial assistance to them. In this regard, this Board looks to the rationale and analysis of their prior decisions and then decisions of the other Growth Boards when deliberating on a matter; however, because each case contains its own unique set of facts and circumstances, the analysis of a prior decision may not necessarily be applicable.

Because of the unique facts and circumstances that are presented in this case, we conclude that the application of *Stare Decisis* is not appropriate. This is not to say that there may be a time when the facts before a legislative body are so similar to those of a prior matter that the doctrine would apply. But that is not the case in the current situation, especially given the period of time that has elapsed between this case and the prior case and the application of these changes to all of the County's general aviation airports.

Kittitas County's KCC 17.58, Airport zone:

The primary question with this issue is whether the County's development regulations, which permit residential development of varying densities within the airport overlay zone, are compliant with the GMA. The Board looks to two relevant statutes – the GMA and the Planning Enabling Act, prior case law, and the parties' briefs and arguments to determine whether the County is in compliance with the GMA.

Reference to General Aviation Airports (GAA) is contained in RCW 36.70A.510, which states:

> "[A]doption and amendment of comprehensive plan provisions and development regulations under this chapter affecting a general aviation airport are subject to RCW 36.70.547."

RCW 36.70.547, a provision of the Planning Enabling Act, states that every city and county having a general aviation airport in its jurisdiction:

"[S]hall, through its comprehensive plan and development regulations,

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> discourage the siting of incompatible uses adjacent to such general aviation airport."

It is clear by these two statutes that there is a GMA requirement for cities and counties to discourage incompatible uses adjacent to their airports.

There are several Western Board cases which address the concept of "incompatible uses" as mentioned in RCW 36.70.547. In *Klein v. San Juan County*, the Western Board stated:

> A county is not compliant with GMA requirements regarding siting of general aviation airports if it fails to preclude non-compatible uses within the final approach areas.[127]

In *Abenroth v. Skagit County*, the Western Board said:

> RCW 36.70A.510 requires a local government to adopt land use policies and DRs that preclude incompatible land uses adjacent to airports.[128]

Furthermore, in *Achen v. Clark County*, the Western Board, in addressing the application of RCW 36.70A.200, determined that residential development is usually an inappropriate use:[129]

> [Development regulations] are appropriate vehicles to prevent encroachments on surrounding airport property that make siting and maintenance of existing airports difficult. Residential designation of surrounding properties is usually inappropriate. (Board emphasis)

The issue currently before the Board stems from safety – which is why the Petitioners are challenging the County's residential densities within the Accident Safety Zones. WSDOT Aviation Division's Airport Land Use Compatibility Program (ALUCP) is based on Title 14, CFR C-Part 77 – Objects Affecting Navigable Airspace, and recognizes the

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[127] Klein v. San Juan County, WWGMHB Case No. 02-2-0008, FDO (Oct. 18, 2002).

[128] Abenroth v. Skagit County, WWGMHB Case No. 97-2-0060, FDO (Jan. 23, 1998).

[129] Achen v. Clark County, WWGMHB Case No. 95-2-0067, FDO (Sept. 20, 1995).

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National Transportation Safety Board's (NTSB) six Accident Safety Zones[130]:

Zone 1: Runway Protection Zone

Zone 2: Inner Safety Zone

Zone 3: Inner Turning Zone

Zone 4: Outer Safety Zone

Zone 5: Sidelines Safety Zone

Zone 6: Traffic Pattern Zone

It can be surmised from the ALUCP Matrix that residential development is considered an incompatible use by the agency, with the agency recommending for every zone to either prohibit residential use completely or allow limited density.[131] For example, WSDOT-Aviation Matrix recommends no residential development within Accident Safety Zones 1, 2, and 5 and low-density residential uses within Zones 3, 4, and 6 (e.g. 1 du/2.5 acre – 1 du/5 acre).

Utilizing the best available objective information, such as the National Transportation Safety Board (NTSB) data and analysis, case law relative to liability and risk, and current risk identification, WSDOT Aviation Division formulated its recommendations to prevent incompatible uses from being permitted within airport overlay zones. The Aviation Division found the most critical areas to protect from incompatible land use are those areas below the approach and departure paths to an airport. [132] According to WSDOT Aviation Division,

> "[B]asing land use decisions upon fact, historic data, and applying best practice recommendations supplied by the Airport Land Use Compatibility Program, assists jurisdictions in crafting defensible, objective zoning laws and aid in avoiding costly litigation."[133]

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[130] *See* Petitioners' Exhibit 22G, Appendix A – Aircraft Accident Safety Zone Diagram

[131] Petitioners' Exhibit 22G: Airports and Compatibility Land Use, Vol. 1, Appendix B, pp. 40-43, WSDOT Aviation Division, Feb. 1999.

[132] Id to citation 91, p. 13; *see also*, Petitioners' Exhibit 22G, at 21

[133] Id, p. 17.

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As close as WSDOT Aviation Division comes to saying residential use is an example of incompatible use is found on page 21 of the *Airports and Compatible Land Use* document. The Aviation Division states:

> Utilizing the information gathered by the NTSB and plotted by Hodges and Shutt, the WSDOT Aviation Division developed a matrix of recommendations for land use compatibility based on the accident rate per acre within the particular zone. The recommendations focus densities and incompatible land uses away from the critical areas of flight."[134](Board emphasis)

In addition to discouraging incompatible uses, RCW 36.70.547 also requires formal consultation with WSDOT Aviation Division and other interested parties. Although consultation is required, each jurisdiction has discretion as to their final adopted comprehensive plan and development regulations, as long as they are within the guidelines and requirements of the GMA. Recognizing that one size does not fit every situation, WSDOT Aviation Division and the Department of Community, Trade and Economic Development (CTED) developed a matrix "offering a menu of recommendations for compatible development adjacent to an airport." [135] A comparison between WSDOT Aviation Division's matrix and KCC 17.58, the County's airport development regulations, indicates significant differences between the two.

Airport Safety Zone	WSDOT-Aviation Recommendation	KCC 17.58.050(2) Use Table
Zone 1 Runway Protection	Prohibit all residential land uses	Encourages land uses that a relatively unoccupied by people (i.e. mini-storage, parking lot) No stated prohibition on residential uses
Zone 2 Inner Safety	Prohibit all residential land uses	Outside Ellensburg UGA: 1 du/3 acres Inside Ellensburg UGA: 1 du/acre

[134] Id p. 21.

[135] Airports and Compatible Land Use, Vol. 1, WSDOT, p. 14, Feb. 1999.

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Zone 3 Inner Turning	Less than 4000 feet of runway: Prohibit all residential uses Runway 4000 – 5999 feet: 1 du/5 acres Over 6000 feet of runway: 1 du/5 acres	Outside Ellensburg UGA: 1 du/3 acres Inside Ellensburg UGA: land zoned AG-3 – 1 du/3 acres Inside Ellensburg UGA: land zoned UR or RR – 1 du/acre
Zone 4 Outer Safety	Less than 4000 feet of runway: 1 du/5 acres in rural or urban areas Runway 4000 – 5999 feet: 1 du/5 acres in rural; 1 du/2.5 acres in urban Over 6000 feet of runway: 1 du/5 acres in rural; 1 du/2.5 acres in urban	Outside Ellensburg UGA: 1 du/3 acres Inside Ellensburg UGA: land zoned UR or RR – 1du/acre
Zone 5 Sideline	Prohibit all residential land uses	No stated prohibition on residential uses
Zone 6 Airport Operations	Less than 4000 feet of runway: 1 du/5 acres in rural or urban areas Runway 4000 – 5999 feet: 1 du/5 acres in rural; 1 du/2.5 acres in urban Over 6000 feet of runway: 1 du/5 acres in rural; 1 du/2.5 acres in urban	Outside Ellensburg UGA : 1 du/3 acres Inside Ellensburg UGA: 1 du/acre

Table based on KCC 17.58.050(2) and Appendix B of the ACLUP Land Use Matrix

Clearly, there is a substantial difference between the County's airport development regulations and WSDOT Aviation Division's recommendations. The difference is primarily in the residential densities allowed within the specific zones. The question becomes whether the County's development regulations are sufficient to comply with RCW 36.70A.510.

WSDOT Aviation Division submitted numerous letters throughout the County's process making a number of important recommendations. As a technical agency with expertise in this area, the Board gives substantial weight to WSDOT Aviation Division's

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recommendations.[136]

WSDOT Aviation Division's Airports and Compatible Land Use document was written to provide information and direction concerning airports to Washington's cities and counties. WSDOT knows there will be land use conflicts. In the document, the Aviation Division wrote,

> "It is in [the] interest of both parties to incorporate proactive language, policies and procedures which protect the airport and the community from incompatible land use decision-making."

The County's airport zone, KCC 17.58 was originally adopted in 2001, and subsequently amended in 2006, with the adoption of Ordinance 2007-22. In their recommendation letter and report dated July 25, 2006, WSDOT Aviation Division made numerous specific recommendations.[137] Although many of the recommendations were adopted by the County in KCC 17.58, none of the recommendations concerning the six zones that make up the Airport Overlay Zone were adopted. One of those recommendations concerned the Runway Protection Zone, Zone 1 for which WSDOT Aviation Division stated,

> "WSDOT's program recommends against residential uses in the runway protection zones located at each runway end and suggests communities allow only minimal development in these areas."[138]

The County did not adopt this recommendation and currently has no residential restrictions. Another recommendation concerned "High-intensity" land use and recommended residential cluster developments should be discouraged within the extended

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[136] As the Central Board expressed in *Pruitt v. Town of Eatonville*, CPSGMHB Case No. 06-3-0016 (FDO, Dec. 18, 2006) the Hearings Boards shall give "substantial weight to the WSDOT Aviation Division's comments and concerns...":

> [T]he provisions of RCW 36.70A.510 and RCW 36.70.547 provide explicit statutory direction for local governments to give substantial weight to WSDOT Aviation Division's comments and concerns related to matters affecting safety at general aviation airports. Eatonville "*shall* . . . discourage the siting of incompatible uses adjacent to [Swanson Field]." RCW 36.70.547.

[137] Letter from WSDOT Aviation Division, July 25, 2006.

[138] Id.

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runway centerline. Again, the County did not adopt restrictions and currently has no stated prohibition against clustering in Zones 2 and 3.

On June 12, 2007, WSDOT Aviation Division submitted its final comments concerning the amendments to the Kittitas County Development Code. In that letter, WSDOT said "[W]e support the proposal and view it as an important step towards protecting the county's public use airports from incompatible development."[139] WSDOT Aviation Division's support was for the recommendations by the Planning Commission and indicted the recommendations recognized all general aviation airports and clarified the County's existing airport overlay zone.

It's clear to the Board the County adopted the recommendation to recognize all general aviation airports in KCC 17.58, but it's also clear there were no changes made to the Airport Overlay Zones, specifically Zones 1, 2 and 5, which fail to have any restrictions on residential use, this in light of the safety concerns expressed by WSDOT in its manual, and recommendations in its letter of July 26, 2006.

The Board agrees with the Petitioners. Given the potential seriousness of the consequences of not restricting residential use in Zones 1, 2 and 5, and the requirement of RCW 36.70A.510, the Board finds the County out of compliance. This issue concerns all the airports in Kittitas County, not just Bowers Field. The letter sent to the County dated July 25, 2006, was a strong indication WSDOT Aviation Division considered KCC 17.58 outdated and in need of significant changes. The development regulations adopted by the County fail to discourage the siting of incompatible uses, such as residential urban density, within close proximity and adjacent to its general aviation airports. WSDOT Aviation Division's recommendations for airport zones are based on best available fact, in-depth safety and flight studies, and case law. The adopted regulations in Kittitas County's KCC 17.58 for Zones 1, 2 and 5 fail to take into consideration the safety concerns and other consequences of allowing residential uses in these zones.

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[139] Letter from WSDOT Aviation Division, June 12, 2007.

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Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence the action of the County in adopting KCC 17.58 is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds the above mentioned Kittitas County chapter fails to protect the County's airports as required by RCW 36.70A.020(3) and RCW 36.70A.510.

VI. INVALIDITY

The request for an order of invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King 06334 Fallgatter VIII v. City of Sultan (Feb. 13, 2007)* #06-3-0034 Final Decision and Order Page 12 of 17 *County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. The Petitioners have requested the Board to find Issue Nos. 1 through 8 invalid to protect a finding of non-compliance from vested development.

Applicable Law:

The GMA's Invalidity Provision, RCW 36.70A.302, provides:

> (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
>
> (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the

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board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Discussion and Analysis:

A finding of invalidity may be entered only when a board makes a finding of non-compliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1). The Board has also held that invalidity should be imposed if continued validity of the non-compliant Comprehensive Plan provisions or development regulations would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant planning.

The Petitioners ask this Board to issue a finding that the actions of the County substantially interfere with the fulfillment of the goals of the GMA. In the discussion of the legal issues in this case, the Board found and concluded that Kittitas County's adoption of Ordinance No. 2007-22 was clearly erroneous and non-compliant with the requirements of RCW 36.70A.070, and .110. Specifically, the Board finds that Kittitas County's actions reflected in Issue No.1, substantially interfere with the following goals of the GMA:

Goal 1 of the GMA, RCW 36.70A.020(1), provides that "Urban growth: Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner."

Clearly, from our findings herein, the actions of the County have substantially interfered with this goal. The County's adoption of Ordinance 2007-22, which includes KCC 16.09 Performance based clustering, KCC 17.08 Accessory dwelling units, KCC 17.22 Urban residential zone, KCC 17.28 Agriculture-3, KCC 17.30 Rural-3, and KCC 17.56 Forest and range zone, allows urban density in the rural area and fails to provide adequate public facilities and services in an efficient manner.

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Goal 2 of the GMA, RCW 36.70A.020(2), provides that reducing sprawl is a key goal of the Act: "Reduce the inappropriate conversion of undeveloped land into sprawling, low density development."

The County's adoption of Ordinance 2007-22, which includes KCC 17.28 Agriculture-3 and KCC 17.30 Rural-3, allows unlimited urban density in the rural area. The County's action clearly allows small urban-like lots, which affects water quality and quantity; allows growth in the rural area, which makes intensive use of land to such a degree as to be incompatible with the primary use of land for agriculture; and allows densities inconsistent with rural character.

Goal 8 of the GMA, RCW 36.70A.020(8), "Natural resource industries, maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses."

Clearly, the designation and division of thousands of acres of rural land into three-acre lots fails to maintain and enhance the natural resource-based industries in Kittitas County and frustrates this goal. There is a clear danger these lands will be lost to the agricultural and forest industries, if invalidity were not found.

Goal 9 of the GMA, RCW 36.70A.020(9), "Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities."

The County's adoption of Ordinance 2007-22, which includes KCC 17.28 Agriculture-3, and KCC 17.30 Rural-3, by allowing unlimited three-acre parcels of land throughout the rural area fails to retain open space, fails to enhance recreational opportunities, and fails to conserve fish and wildlife habitat. Intense urban development segregates large tracts of the rural area and fragments wildlife habitat.

Goal 10 of the GMA, RCW 36.70A.020(10), "Environment. Protect the environment and enhance the state's quality of life, including air and water quality, and the availability of water.

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The County's adoption of Ordinance 2007-22, which includes KCC 17.28 Agriculture-3, and KCC 17.30 Rural-3, allows urban density in the rural area, which fails to protect the environment, particularly water quality. Three-acre urban density increases the number of septic systems and individual wells affecting ground water quality and quantity.

Goal 12 of the GMA, RCW 36.70A.020(12), "Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."

The County's adoption of Ordinance 2007-22, which includes chapters KCC 16.09, KCC 17.08, KCC 17.22, KCC 17.28, KCC 17.30, KCC 17.56, allows urban development in the rural lands without the public facilities and services, such as public sewer, public water, and public transportation, to adequately support the development without decreasing current service levels for urban density.

Accordingly, the Board enters a determination of invalidity and specifically finds chapters KCC 16.09, KCC 17.08, KCC 17.22, KCC 17.28, KCC 17.30, KCC 17.56 of Ordinance 2007-22 out of compliance and invalid and remands Ordinance No. 2007-22 to Kittitas County to take legislative action consistent with this Order.

Conclusion:

The Board finds that a determination of invalidity is properly issued and actions found out of compliance in Issue No. 1 are invalid.

VII. FINDINGS OF FACT

1. Kittitas County is a county located East of the crest of the Cascade Mountains and opted to plan under the GMA and is therefore required to plan pursuant to RCW 36.70A.040.

2. Kittitas County adopted the Kittitas County Development Code Update as Ordinance No. 2007-22 on July 19, 2007.

3. Kittitas County allows densities in the Agriculture-3 (KCC 17.28) and Rural-3 (KCC 17.30) which are urban in the rural element and not in compliance with the Growth Management Act. The County has not developed a written record

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explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act. Kittitas County, in adopting KCC 16.09, KCC 17.08, KCC 17.12 (zoning map), 17.22, and 17.56, allows urban-like densities in the rural areas.

4. Kittitas County by adopting KCC 17.29 and KCC 17.36 impermissibly allows urban uses in its rural areas and fails to include standards to protect the rural character as required by RCW 36.70A.020(10), RCW 36.70A.070(5)(b) and (c), and RCW 36.70A.110(1). The Petitioners failed to brief KCC 16.09 and KCC 17.12 in this issue and, therefore, these two provisions are deemed abandoned.

5. Kittitas County impermissibly allows urban uses in its agricultural lands of long-term significance, and fails to include standards to limit such uses and protect the commercial agricultural zone as encouraged and required by RCW's 36.70A.020(1, 8), 36.70A.060, 36.70A.070, and 36.70A.177.

6. Kittitas County's KCC 16.04 fails to protect water quality and quantity as required by RCW's 36.70A.020(10) and 36.70A.070(5)(c)(iv).

7. Kittitas County's KCC 17.32, KCC 17.40 and KCC 17.44 fail to protect the rural area as required by RCW's 36.70A.020(1-2, 12), 36.70A.070, and 36.70A.110.

8. Kittitas County's KCC 17.29 and KCC 17.31 fail to protect the rural area and ALOLTCS as required by RCW's 36.70A.020(8), 36.70A.070(5)(a) and (b), and 36.70A.177.

9. Kittitas County's KCC 17.58 fails to protect the County's airports as required by RCW 36.70A.020(3) and RCW 36.70A.510 (with reference to the Planning Enabling Act statute RCW 36.70.547).

VIII. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.

2. This Board has jurisdiction over the subject matter of this action.

3. Petitioners have standing to raise the issues raised in the Petition for Review.

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4. Petition for Review in this case was timely filed.

5. Kittitas County has allowed urban densities in the rural areas and failed to develop a written record explaining how the rural element harmonizes the planning goals in the GMA. This action is not in compliance with the GMA.

6. Kittitas County has allowed urban uses in its rural areas and fails to include standards to protect the rural character. This action is not in compliance with the GMA.

7. Kittitas County allows urban uses in its agricultural lands of long-term significance, and fails to include standards to limit such uses and protect the commercial agricultural zone as encouraged. This action is not in compliance with the GMA.

8. Kittitas County fails to protect water quality and quantity as required by RCW's 36.70A.020(10) and 36.70A.070(5)(c)(iv) by allowing multiple subdivisions of common ownership side-by-side, which then use multiple exempt wells. This action is not in compliance with the GMA.

9. Kittitas County allows commercial development throughout the County along designated roads and highways, within improperly designated urban areas called Urban Growth Nodes, and in the unincorporated expansion areas outside of the UGAs of Ellensburg and Cle Elum. This action is not in compliance with the GMA.

10. Kittitas County allows increased density and non-conforming lots in the rural areas, including the Agriculture-20 Zone and the Commercial Agriculture Zone. This action is not in compliance with the GMA.

11. Kittitas County allows unlimited urban residential development within the Airport Overlay Zone designations, primarily in Zones 1, 2, and 5. This action is not in compliance with the GMA.

IX. INVALIDITY FINDINGS OF FACT
Pursuant to RCW 36.70A.300 (2)(a)

We incorporate the Findings of Fact above and add the following:

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1. The Board finds and concludes that the County's actions in adopting KCC 17.28 Agricultural-3 Zone, and KCC 17.30 Rural-3 Zone substantially interferes with the goals of the GMA because they fail to preserve and protect the rural area within the County.

2. The Board finds and concludes that the County's actions in adopting KCC 16.09 (Performance Based Cluster Platting), KCC 17.08 (Detached Accessory Dwelling Units), KCC 17.12 (zoning map), KCC 17.22 (Urban Residential zone), and KCC 17.56 (Forest and Range zone), substantially interferes with the goals of the GMA because they fail to preserve the rural area within the County.

3. The County adopted regulations which allow densities greater than 1 du/5 acres in the rural area interfering with RCW 36.70A.020(1).

4. The County's action allows inappropriate conversion of undeveloped land in sprawling, low-density development interfering with RCW 36.70A.020(2).

5. The County's action conflicts with the natural resource industries, open space and recreation and interferes with RCW 36.70A020(8) and (9).

6. The County's action fails to protect surface and ground water quality and availability and interferes with RCW 36.70A.020(10) and (12).

7. The Board finds and concludes that the continued validity of these actions of the County would substantially interfere with the goals of the GMA and their invalidity would cause no hardship upon the County during the period necessary to bring this issue into compliance.

X. CONCLUSIONS OF LAW
Pursuant to RCW 36.70A.300 (2) (a)

1. The Board has jurisdiction over the parties and subject matter of this case.

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2. Kittitas County allowed improper densities in the Rural element of the County when it adopted two zones, KCC 17.28, Agriculture-3, and KCC 17.30 Rural-3, which allow 1 du/3 acre zoning in the rural area. The County's action therefore violates RCW 36.70A.070(5) and RCW 36.70A.110(1) and is out of compliance with the GMA. The County's action substantially interferes with the fulfillment of Goals 1, 2, 8, 9, 10 and 12 of the GMA. The Board concludes that these actions or lack of actions substantially interfere with the local jurisdictions' ability to engage in GMA-compliant planning.

3. Kittitas County allowed improper densities in the rural areas of the County when it adopted KCC 16.09 (Performance Based Cluster Platting), KCC 17.08 (Detached Accessory Dwelling Units), KCC 17.12 (zoning map), KCC 17.22 (Urban Residential zone), and KCC 17.56 (Forest and Range zone), which allow urban-like densities in the rural areas, and therefore violates RCW 36.70A.070(5) and RCW 36.70A.110(1) and is out of compliance with the GMA. The County's action substantially interferes with the fulfillment of Goals 1, 2, 8, 9, 10, and 12 of the GMA. The Board concludes these actions or lack of actions substantially interferes with the local jurisdictions ability to engage in GMA-compliant planning.

XI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. Kittitas County's adoption of Ordinance No. 2007-22 is clearly erroneous and does not comply with the requirements of the GMA, and is not guided by GMA goals RCW 36.70A.020(1), (2), (3), (8), (9), (10) and (12) and is found out of compliance in Issues 1, 2, 3, 4, 6, 7, and 8 to the extent herein ruled.

2. Kittitas County's adoption of Ordinance 2007-22 allows urban density in the rural areas with three-acre zoning in the Agriculture-3 and Rural-3 zones outside of the urban growth areas and limited areas of more intensive rural development (LAMIRDs) in chapters 16.09, 17.08, 17.22, 17.28, 17.30, and 17.56 of the Kittitas County Code violate RCW

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Growth Management Hearings Board
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36.70A.070 and 36.70A.110 and substantially interferes with GMA Goals RCW 36.70A.020 (1-2, 8-10, 12) and the Board finds these provisions invalid.

3. Therefore the Board remands Ordinance No. 2007-22 to Kittitas County with direction to the County to achieve compliance with the Growth Management Act pursuant to this decision no later than **September 17, 2008, 180 days** from the date issued. The following schedule for compliance, briefing and hearing shall apply:

- The County shall file with the Board by **September 30, 2008, an original and four copies** of a **Statement of Actions Taken to Comply** (SATC) with the GMA, as interpreted and set forth in this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on the parties. **By this same date, the County shall file a "Remanded Index," listing the procedures and materials considered in taking the remand action.**

- By no later than **October 14, 2008**[140], Petitioners shall file with the Board an **original and four copies** of Comments and legal arguments on the County's SATC. Petitioners shall simultaneously serve a copy of their Comments and legal arguments on the parties.

- By no later than **October 28, 2008,** the County and Intervenors shall file with the Board an **original and four copies** of their Response to Comments and legal arguments. The County and Intervenors shall simultaneously serve a copy of such on the parties.

- By no later than **November 12, 2008,** Petitioners shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments. Petitioners shall serve a copy of their brief on the parties.

[140] October 14, 2008, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2).

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- Pursuant to RCW 36.70A.330(1) and WAC 242-02-891[141] the Board hereby schedules a telephonic Compliance Hearing for **November 19, 2008, at 10:00 a.m. The compliance hearing shall be limited to consideration of the Legal Issues found noncompliant and remanded in this FDO.** The parties will call **360-407-3780 followed by 211432 and the # sign.** Ports are reserved for: **Mr. Scully, Mr. Caulkins, Mr. Slothower, Mr. Cook, and Mr. McElroy.** If additional ports are needed please contact the Board to make arrangements.

If the County takes legislative compliance actions prior to the date set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review:

Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

Enforcement:

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[141] The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and additional procedures for the compliance hearing.

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The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

Service:

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

SO ORDERED this 21st day of March 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

John Roskelley, Board Member

Dennis Dellwo, Board Member

Concurring Opinion of Board Member Joyce Mulliken:

I concur with the conclusions drawn by my colleagues in this matter. I write separately to address Kittitas County's rural densities.

As this Board concluded in its August 20, 2007, Final Decision and Order in Kittitas County Conservation v. Kittitas County, EWGMHB Case No. 07-1-0004c, the densities permitted by Kittitas County within the Agricultural-3 and Rural-3 zones are urban in nature and prohibited by the County's Rural Element. Case No. 07-1-0004c, FDO, at 17. A similar issue has been presented in this matter, with Petitioners' continuing to question the County's densities within rural areas. (See Legal Issue 1, *supra*). I believe it is vital, for both petitioners and respondents alike, that the Board acts consistently with its prior

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decisions, especially if the facts and circumstances are related. And therefore, I concur that this Board should respond similarly to the issue of rural densities as it did in Case No. 07-1-0004c. However, it is the Petitioners' repeated attempts to have the Board delineate a standard for rural density that would apply to all counties throughout Washington State, regardless of regional differences, which is troubling. This is especially true given the fact that this Board's conclusions in the prior case are currently on appeal before the Court of Appeals Docket Nos. 07-2-00549-1 and 07-2-00552-1.

As I noted in the prior decision, my concern is in the long-term viability of the agricultural industry within Kittitas County. When land is covered with impervious surface, the likelihood of its return to agricultural production is slim – a fact that has been demonstrated in urban counties such as King County – and something Kittitas County could address by adopting alternative methods to ensure farmers' economic success and the conservation of agricultural lands. *Id.*, at 61. Although my concern for the conservation of agricultural lands is also tempered by the GMA's mandate that jurisdiction's be granted discretion in planning choices so as to respond to the needs and character of their community, Kittitas County has yet to demonstrate through written record how the County's rural element harmonizes the planning goals in the GMA and meets the requirements of the Act as required by RCW 36.70A.070(5)(a).

Joyce Mulliken, Board Member

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State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION, RIDGE, FUTUREWISE,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

SON VIDA, II, TEANAWAY RIDGE, LLC, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., KITTITAS COUNTY FARM BUREAU

Intervenors.

Case No. 07-1-0015

CERTIFICATE OF SERVICE

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; am an employee of this board and my business address is 15 West Yakima Avenue, Suite 102, Yakima, Washington 98902.

On this date, I mailed a true copy of FINAL DECISION AND ORDER, in the above entitled matter, to each of the persons listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Yakima, Washington as addressed herein:

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Growth Management Hearings Board
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Yakima, WA 98902
Phone: 509-574-6960
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Kittitas County Conservation
P.O. Box 23
Thorp, WA 98946

Ridge
P.O. Box 927
Roslyn, WA 98941

Futurewise
814 2nd Ave., Ste. 500
Seattle, WA 98104

Keith Scully
Futurewise
814 2nd Ave., Ste. 500
Seattle, WA 98104

Kittitas County Board of Commissioners
205 W. 5th Ave.
Ellensburg, WA 98926

Neil Caulkins
Deputy Prosecuting Attorney
205 W. 5th Ave., Room 213
Ellensburg, WA 98926

BIAW
111 21st Ave. SW
Olympia, WA 98507

Central WA Home Builders Assoc.
3301 W. Nob Hill
Yakima, WA 98902

Mitchell Williams
P.O. Box 1702
Ellensburg, WA 98926

Timothy Harris
Andrew Cook
111 21st Ave. SW
Olympia, WA 98507

Son Vida, II
2000 124th Ave., NE, Ste. B-100
Bellevue, WA 98005

Teanaway Ridge, LLC
P.O. Box 808
Cle Elum, WA 98922

Jeff Slothower
P.O. Box 1088
Ellensburg, WA 98926

Urban Eberhart
Kittitas County Farm Bureau Inc.
890 Kittitas Hwy.
Ellensburg, WA 98926

Gregory McElroy
1808 N. 42nd St.
Seattle, WA 98103

Kittitas County Auditor
205 W. 5th Ave.
Ellensburg, WA 98926

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I certify under penalty of perjury, that the foregoing is true and correct.

DATED this 21st day of March 2008, at Yakima, Washington.

Angie Andreas

Eastern Washington
Growth Management Hearings Board
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ATT - B

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION, a Washington not-for-profit corporation; BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a Washington not-for-profit corporation; and MITCHELL F. WILLIAMS, d/b/a MF Williams Construction Co., Inc., Petitioners/Intervenors, vs. EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, KITTITAS COUNTY CONSERVATION COALITION, RIDGE, and FUTUREWISE, Respondents, and KITTITAS COUNTY, a Washington municipal corporation, Respondents.	No. 08 2 00195 7 MEMORANDUM DECISION AND ORDER OF STAY

INTRODUCTION

On March 21, 2008 the Eastern Washington Growth Management Hearings Board (Board) issued a Final Decision and Order (FDO) in its Case No. 07-1-0015,

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ruling that Kittitas County Ordinance 2007-22 updating the County's developmental regulations was non-compliant with the Growth Management Act (GMA), Chapter 36.70A RCW. The Board also issued a Determination of Invalidity for a number of Kittitas County's development regulations, including Chapter 16.09 KCC (Performance Based Cluster Platting), Chapter 17.08 KCC (Definitions), Chapter 17.22 KCC (UR-Urban Residential Zone), Chapter 17.28 KCC (A-3-Agricultural 3 Zone), Chapter 17.30 KCC (R-3-Rural 3 Zone), and Chapter 17.56 KCC (F-R-Forest and Range Zone).[1] The Board remanded Ordinance 2007-22 back to Kittitas County, directing the County to achieve compliance with the Growth Management Act no later than September 17, 2008 and scheduling a set of deadlines by which it would determine whether Kittitas County had taken the necessary actions to comply with the GMA.

On April 4, 2008 the intervenors (HomeBuilders) filed a Petition for Review seeking reversal of the Board's FDO that pertained to issues[2] 1, 2, 3 and 4.[3] HomeBuilders filed a motion to stay the Board's FDO and compliance proceedings pending review by this court of the Board's FDO. Respondents Kittitas County Conservation Coalition, Ridge, and Futurewise (collectively, Futurewise) oppose the motion to stay. The court heard oral argument on April 21, 2008.

STANDARDS FOR CONSIDERING STAY OF THE DECISION OF AN ADMINISTRATIVE AGENCY PENDING REVIEW

While the court does have the inherent power in appropriate cases to enter a stay of an administrative decision while an appeal is pending, Mentor v. Nelson, 31

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[1] KCC refers to the Kittitas County Code.

[2] Issue No 1: Does Kittitas County's failure to eliminate densities greater than one dwelling unit per five acres in rural areas outside of the urban growth areas and limited areas of more intensive rural development (LAMIRD) violate RCW 36.70A.020, .040, .070, .110 and .130?

Issue No. 2: Does Kittitas County's failure to prohibit urban uses and urban development in rural areas and the failure to include standards to protect the rural area violate RCW 36.70A.020, .040, .070, .110 and .130?

Issue No. 3: Does Kittitas County's failure to prohibit urban uses in designated agricultural lands of long term commercial significance violate RCW 36.70A.020, .040, .060, .070, .110, .130, and .177?

Issue No. 4: Does Kittitas County's failure to require that all land within a common ownership or scheme of development be included within one application for a division of land violate RCW 36.70A.020, .040, .060, .070, .130 and .177?

[3] Subsequently Kittitas County and others have filed their separate petitions for review.

Wn.App. 615 (1982), the court is guided by the Administrative Procedures Act in particular in determining whether the stay sought is appropriate. Specifically, RCW 34.05.550(2) authorizes a party to seek a stay or other temporary remedy in the reviewing court after it has filed a petition for judicial review. HomeBuilders has filed that motion. However, because the judicial relief sought is for a stay or other temporary remedy from agency action based on public health, safety or welfare grounds, RCW 34.05.550(3) requires the court to deny the stay unless the court determines the applicant is likely to prevail when the court finally disposes of the matter; that without relief the applicant will suffer irreparable injury; that the grant of relief to the applicant will not substantially harm other parties to the proceedings; and that the threat to public health, safety or welfare is not sufficiently serious to justify the agency action in the circumstances.

As the Board's FDO appears to have been based on public health, and safety and/or welfare grounds,[4] the court must analyze HomeBuilders' motion for stay in accordance with RCW 34.05.550(3) to determine whether it has met each of the four requirements; otherwise, the court must deny the motion.

ANALYSIS

1. Whether HomeBuilders are likely to prevail on the merits. Comprehensive plans and development regulations adopted pursuant to the GMA are presumed valid upon adoption by local government. RCW 36.70A.320. The burden rests with the complainant to demonstrate that any action taken by the local jurisdiction is not in compliance with the GMA. In reviewing a GMA decision and action of a local jurisdiction the Board must find compliance unless it determines the action taken by the local jurisdiction is clearly erroneous in view of the entire record before it and in light of the goals and requirements of the GMA. RCW 36.70A.320. In order to deem an action clearly erroneous, the Board must be "left with the firm and definite conviction a mistake

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[4] See RCW 36.70A.010.

has been committed." Department of Ecology v. Public Utility District No. 1, 121 Wn.2d 179, 201 (1993).

While local governments have broad discretion to develop comprehensive plans and development regulations tailored to local circumstances, that local discretion is bounded by the goals and requirements of the GMA. So, in reviewing the planning decisions of local governments, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter" and to "grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter." RCW 36.70A.320(1).[5]

From a review of the Board's FDO it appears the Board relied on its decision in Board Case No. 07-1-0004[6] wherein:

> "The Board finds that the densities allowed by regulations Agricultural-3 and Rural-3 are urban in rural element and not in compliance with the Growth Management Act and the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act."

Critical also to the Board's conclusion was the finding the County had not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the GMA.[7] The Board accepted Futurewise's argument that GMA requirements control over goals, that small urban-like lots affect water quality and quantity, that urban growth refers to growth which makes intensive use of land to such a degree as to be incompatible with the primary use of the land for agriculture, that the rural element shall provide densities consistent with rural character, that development regulations shall be consistent with a County's comprehensive plan, that Tugwell v. Kittitas County[8] suggests the size of a lot to produce food or other agricultural products is greater than five acres, that three acre zoning throughout Kittitas

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[5] Moreover, Boards are to make informed decisions in a clear, consistent, timely and impartial manner that recognizes regional diversity. WAC 242-02-020(1).
[6] Kittitas County Cause No. 07-2-00552-1.
[7] See FDO, page 11.
[8] 90 Wn.App. 1 (1997).

County fails to provide for a variety of rural densities, and that Goldstar Resorts v. Futurewise[9] holds that Growth Boards retain some discretion as to what is urban and what is rural based on local circumstances and the written record, as long as Viking[10] is taken into account. The Board concluded that the densities allowed by the Ag-3 (KCC 17.28) and Rural-3 (KCC 17.30) are urban in the rural element and not in compliance with the GMA and that the County has not developed a written record explaining how the rural element harmonizes the plan and the GMA and meets the requirements of the GMA. The Board also concluded that KCC 16.09, 17.08, 17.12, 17.22, and 17.56 all allow urban-like densities in rural areas and are not in compliance with the GMA.

In reviewing the pleadings presented to the court it appears both the Board and Futurewise have completely ignored by at least what on its face can be considered a written record contemplated by RCW 36.70A.070(5)(a) wherein the County set forth in some detail in Paragraph 8.3 of its Comprehensive Plan a description of current land use patterns in rural Kittitas County as set forth on pages 159 and 160 of the *Kittitas County Comprehensive Plan: December 2006, Volume 1.* And, in hearing the arguments of Futurewise and reviewing the conclusions of the Board, it appears that each is fixated on the notion that just because a parcel of property may be too small to accommodate agriculture or farming it therefore becomes urban in nature. Moreover, relying on Tugwell, supra at 9 for the proposition that the creation of small parcels not large enough to accommodate agricultural activities demonstrates that the three acre zones are too small to farm and therefore are urban, The Board and Futurewise completely misconstrue Tugwell. Tugwell stood simply for the proposition that the County's record on which it relied in establishing a rezone of certain property was supported by substantial evidence of change of circumstances to support the rezone. Tugwell did not stand for the proposition that three acre parcels are urban in nature.

Nor does the statistical analysis presented by Futurewise necessarily support the proposition parcels of five acres or less, because they may be smaller than the statistical average small farm, are therefore urban. Such a conclusion has no basis in fact. Both the Board and Futurewise completely ignore the broader guideline of RCW

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[9] 140 Wn.App. 378 (2007).
[10] Viking Properties, Inc. v. Holm, 155 Wn.2d 112 (2005).

36.70A.070(5). That subsection, while requiring counties to include a rural element including lands that are not designated for urban growth, agriculture, forest or mineral sources, recognizes that because circumstances vary from county to county, in establishing patterns of rural densities and uses, a county may consider local circumstances, but shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of Chapter 36.70A. RCW 36.70A.070(5)(b) requires that the rural element shall permit rural development, forestry, and agriculture in rural areas. That provision also provides that the rural element shall provide for a variety of rural densities, uses, essential public facilities, rural governmental services needed to serve the permitted densities and uses. And to achieve a variety of rural densities and uses, counties may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character. The County's written record appears to address all those concerns in its Comprehensive Plan at paragraph 8.3.

Rural character is defined in RCW 36.70A.030(15) as:

> (15) "'Rural character' refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:
> (a) in which open space, natural landscape and vegetation predominate over the built environment;
> (b) that foster traditional rural lifestyles, rural based economies, and opportunities to both live and work in rural areas;
> (c) that provide visual landscapes that are traditionally found in rural areas in communities;
> (d) that are compatible with the use of the land by wildlife and for fish and wildlife habitat;
> (e) that reduce the inappropriate conversion of undeveloped land into sprawling, low density development;
> (f) that generally do not require the extension of urban governmental services; and
> (g) that are consistent with the protection of natural surface water flows and ground water and surface water recharge and discharge areas."

Rural development is defined in RCW 36.70A.030(16) as:

(16) "'Rural development' refers to development outside the urban growth area and outside agriculture, forest, and mineral resource lands designated pursuant to RCW 36.70A.170[11]. Rural development can consist of a variety of uses in residential densities, including cluster residential development, at levels that are consistent with preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas."

Finally, urban growth is defined in RCW 36.70A.030(18) as:

(18) "'Urban growth' refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. 'Characterized by urban growth' refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth."

As can be gleaned by the above quoted definitions "rural character", "rural development", and "urban growth" do not necessarily refer to whether a particular parcel of property is farmable or not. Relying, therefore, on a statistical analysis that the average small farm in Kittitas County is 5.62 acres and that therefore anything less than that size is urban in nature belies the definitions and guidelines provided to the County for developing a comprehensive plan and development regulations in connection therewith to define its own rural character, rural development, and urban growth. In fact, the legislature has not defined what constitutes rural density and no case precedent establishes that any parcel less than five acres is necessarily urban in nature.[12]

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[11] Agricultural, forest lands and mineral resource lands of long term significance for commercial production of food or other agricultural products, commercial production of timber or extraction of minerals, respectively.

[12] It is noted a five acre lot is "decidedly" rural in density. See Whidbey Envtl. Action v. Island County, 122 Wn.App. 1561, 169 (2004) and Skagit Surveyors v. Friends, 135 Wn.2d 542, 571 (1998). "Decided rural density" certainly infers small parcels can be considered rural.

On its face, therefore, this court concludes that based on the matters presented, there is a likelihood that HomeBuilders could prevail on the merits on issues 1, 2, 3 and 4.[13]

2. Whether HomeBuilders will suffer irreparable injury if the stay is not granted. If the stay is not granted the County must comply with the Board's FDO concerning the development regulations. Even though the Board's FDO on the County's Comprehensive Plan and other development regulations in the other case[14] is presently awaiting review with the Court of Appeals, the FDO in that case is stayed, thereby relieving the County of the requirement of amending its Comprehensive Plan. As the Comprehensive Plan is now in a state of abeyance pending review, the County now has FDO invalidated development regulations that may be inconsistent with that Comprehensive Plan. If the County, on the one hand, refuses to comply with the Board's FDO in this case, the County faces sanctions. If the County does comply with the Board's FDO while this case is on review the issues herein can become moot[15] during the interim period of the court review process, including the appeal process, leaving property owners in limbo not being able to develop property under the current development regulations and not being able to develop property under any modified regulations should the County comply with the Board's FDO. Too much uncertainty will cause property owners represented by HomeBuilders' position irreparable harm.

3. Whether granting the motion to stay will substantially harm other parties or threaten public health, safety, or welfare. As pointed out by HomeBuilders, the three acre zones in Kittitas County constitute less than 3% of the entire county. Maintaining the status quo until this case is resolved in conjunction with Kittitas County Cause No. 07-2-00552-1 presently awaiting review by the Court of Appeals and for which a stay is in existence, will not harm Futurewise. Rather, it will allow the orderly review of both

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[13] While RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv) require the county to protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water, including protecting surface water and ground waters resources, ruling that Chapter 16.04 of the Kittitas County Code violates the GMA by allowing too many exempt wells appears to go beyond the authority of the review parameters of the Board. The Department of Ecology pursuant to Chapter 90.44 RCW regulates ground water, not a Growth Management Board.

[14] Again, Kittitas County Cause No. 07-2-00552-1.

[15] Even if the County enacts compliant development regulations with provisos should it prevail on appeal, the compliant development regulations are no longer in effect.

cases without causing irreparable harm to any of the parties. Moreover, there are adequate safeguards set forth in the development regulations to protect the health, safety, and welfare of the public pending final resolution of these matters.

Futurewise's argument that it will be deprived of the fruits of its victory is not relevant. The issue to the court is whether the Board properly or adequately reviewed and decided the issues concerning the County's developmental regulations, not who won.

4. Conclusion. Based on the foregoing, the court should grant Homebuilder's motion to stay the proceedings pending review. The court on its own motion will accelerate review to decide this case within the next 60 days on a schedule which should accommodate the parties hereto, unless the parties decide this review should await the outcome of the Court of Appeals' review of Kittitas County Cause No. 07-2-00552-1.

CONCLUSION

Homebuilder's motion to stay the proceedings is granted. The court's motion *sua sponte* to accelerate review is also granted. Please present supplemental orders[16] consistent with this decision.

DATED: April 24, 2008

Richard E Cooper
JUDGE

[16] Those contemplating a briefing schedule and a date for oral argument, or stipulation that the parties will await the outcome of the Court of Appeals' decision in Kittitas County Cause No. 07-2-00552-1.

ATT: C

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

SON VIDA II, TEANAWAY RIDGE, LLC, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., KITTITAS COUNTY FARM BUREAU

Intervenors.

(Kittitas County Superior Court Cause No. 08-2-00195-7)

Case No. 07-1-0015

Order Granting Certificate of Appealability

I. APPLICATIONS FOR CERTIFICATE OF APPEALABILITY

On March 21, 2008, the Eastern Washington Growth Management Hearings Board (the Board) issued its Final Decision and Order (FDO) in EWGMHB Case No. 07-1-0015 *KITTITAS COUNTY CONSERVATION, et al. v. KITTITAS COUNTY et al.*

Five Petitions for Review requesting judicial review of the FDO in this matter have been filed in Kittitas County Superior Court: Kittitas County Superior Court Case Nos. 08-2-00195-7, 08-2-00210-4, 08-2-00224-4, 08-2-00231-7, and 08-2-00239-2. These were filed Pursuant to RCW 36.70A.300(5).

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On April 30, 2008, the Board received KITTITAS COUNTY CONSERVATION, RIDGE, AND FUTUREWISE'S (KCC *et al.*) application for Certificate of Appealability filed by Mr. Tromhimovich.

The Board's jurisdiction is generally limited[1] to addressing whether local governments within the Eastern Washington region have complied with the goals and requirements of the state's Growth Management Act (GMA – Chapter 36.70A RCW) and whether local governments within that region have complied with the provision of the Shoreline Management Act (SMA – Chapter 90.58 RCW). Pursuant to RCW 34.05.518(3, 6) this Board may file a certificate of appealability, authorizing direct review of the decision in this matter.

II. DISCUSSION AND FINDINGS

KCC *et al.* request that the Board to file a certificate of appealability. The Administrative Procedure Act authorizes direct review of the decisions of environmental boards, including the Growth Management Hearings Boards, and provides that a Board should issue a certificate of appealability if it "finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) fundamental and urgent statewide or regional issues are raised; or, (ii) the proceeding is likely to have significant precedential value."[2] Because all of the statutory criteria are met, the Board should issue a certificate of appealability.

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[1] See: RCW 36.70A.280

[2] RCW 34.05.518.

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C-2

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Mr. Trohimovich contends adjacent counties (Yakima, Chelan, Grant, and King) and the region as a whole stand to benefit from a decision from the Court of Appeals. There are no cases from Division Three of the Court of Appeals on the issues of what rural densities comply with the GMA, or requirements for clustering and planned unit development regulations, or on the variety of rural density issues; therefore a quick appellate decision will have significant regional benefit.

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> (b) An environmental board may issue a certificate of Appealability if it finds that *delay* in obtaining a final and prompt determination of the issues *would be detrimental to any party or the public interest* **and either:**
> (i) Fundamental and urgent state-wide or regional issues are raised; or
> (ii) The proceeding is likely to have significant precedential value.

The Board is bound by the criteria established in RCW 34.05.518(3)(b)(i-ii) in determining whether to issue a Certificate of Appealability. In applying these criteria to the present case, and in evaluating the argument presented by Mr. Trohimovich's Application, the Board finds and concludes as follows:

The Eastern Washington Growth Management Hearings Board, EWGMHB, having reviewed the arguments of the Petitioner and being familiar with the law, finds that the statutory criteria for issuance of a certificate of appealability have been met. The issues raised herein are fundamental and of urgent regional and statewide interest. It is important to have this matter decided by Division Three of the Court of Appeals as soon as possible. The issue will have great precedential value in Eastern Washington and the State as a whole. The resolution of these issues will be of great benefit to the parties and their local constituencies. It is unlikely that the Superior Court will have the final review. Direct review by the Court of Appeals will be a more efficient use of the judicial systems valuable time.

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III. ORDER

Pursuant to RCW 34.05.518, the Board **grants** KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE'S Application for a Certificate of Appealability.

SO ORDERED this 6th day of May 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

John Roskelley, Board Member

Dennis Dellwo, Board Member

Joyce Mulliken, Board Member

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State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

SON VIDA II, TEANAWAY RIDGE, LLC, BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., KITTITAS COUNTY FARM BUREAU,

Intervenors.

Case No. 07-1-0015

CERTIFICATE OF SERVICE

Kittitas County Superior Court
Cause No. 08-2-00195-7

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; am an employee of this board and my business address is 15 West Yakima Avenue, Suite 102, Yakima, Washington 98902.

On this date, I mailed a true copy of CERTIFICATE OF APPEALABILITY, in the above entitled matter, together with a copy of the Final Decision and Order issued in EWGMHB Case No. 07-1-0015, submitted to the Clerk of the Court in Kittitas County, to each of the persons listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Yakima, Washington as addressed herein:

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I certify under penalty of perjury, that the foregoing is true and correct.

DATED this 6th day of May 2008, at Yakima, Washington.

Angie Andreas

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ATT-D

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Intervenors.

(Kittitas County Superior Court Cause No. 08-2-00210-4)

Case No. 07-1-0015

Order Granting Certificate of Appealability

I. APPLICATIONS FOR CERTIFICATE OF APPEALABILITY

On March 21, 2008, the Eastern Washington Growth Management Hearings Board (the Board) issued its Final Decision and Order (FDO) in EWGMHB Case No. 07-1-0015 *KITTITAS COUNTY CONSERVATION, et al. v. KITTITAS COUNTY et al.*

Five Petitions for Review requesting judicial review of the FDO in this matter have been filed in Kittitas County Superior Court: Kittitas County Superior Court Case Nos. 08-2-00195-7, 08-2-00210-4, 08-2-00224-4, 08-2-00231-7, and 08-2-00239-2. These were filed Pursuant to RCW 36.70A.300(5).

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On April 30, 2008, the Board received KITTITAS COUNTY CONSERVATION, RIDGE, AND FUTUREWISE'S (KCC *et al.*) application for Certificate of Appealability filed by Mr. Tromhimovich.

The Board's jurisdiction is generally limited[1] to addressing whether local governments within the Eastern Washington region have complied with the goals and requirements of the state's Growth Management Act (GMA – Chapter 36.70A RCW) and whether local governments within that region have complied with the provision of the Shoreline Management Act (SMA – Chapter 90.58 RCW). Pursuant to RCW 34.05.518(3, 6) this Board may file a certificate of appealability, authorizing direct review of the decision in this matter.

II. DISCUSSION AND FINDINGS

KCC *et al.* request that the Board to file a certificate of appealability. The Administrative Procedure Act authorizes direct review of the decisions of environmental boards, including the Growth Management Hearings Boards, and provides that a Board should issue a certificate of appealability if it "finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) fundamental and urgent statewide or regional issues are raised; or, (ii) the proceeding is likely to have significant precedential value."[2] Because all of the statutory criteria are met, the Board should issue a certificate of appealability.

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III. ORDER

Pursuant to RCW 34.05.518, the Board **grants** KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE'S Application for a Certificate of Appealability.

SO ORDERED this 6th day of May 2008.

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State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
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KITTITAS COUNTY,

Respondent,

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Intervenors.

Case No. 07-1-0015

CERTIFICATE OF SERVICE

Kittitas County Superior Court
Cause No. 08-2-00210-4

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; am an employee of this board and my business address is 15 West Yakima Avenue, Suite 102, Yakima, Washington 98902.

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III. ORDER

Pursuant to RCW 34.05.518, the Board **grants** KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE'S Application for a Certificate of Appealability.

SO ORDERED this 6th day of May 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; am an employee of this board and my business address is 15 West Yakima Avenue, Suite 102, Yakima, Washington 98902.

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Intervenors.

(Kittitas County Superior Court Cause No. 08-2-00231-7)

Case No. 07-1-0015

Order Granting Certificate of Appealability

I. APPLICATIONS FOR CERTIFICATE OF APPEALABILITY

On March 21, 2008, the Eastern Washington Growth Management Hearings Board (the Board) issued its Final Decision and Order (FDO) in EWGMHB Case No. 07-1-0015 *KITTITAS COUNTY CONSERVATION, et al. v. KITTITAS COUNTY et al.*

Five Petitions for Review requesting judicial review of the FDO in this matter have been filed in Kittitas County Superior Court: Kittitas County Superior Court Case Nos. 08-2-00195-7, 08-2-00210-4, 08-2-00224-4, 08-2-00231-7, and 08-2-00239-2. These were filed Pursuant to RCW 36.70A.300(5).

Eastern Washington
Growth Management Hearings Board
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Fax: 509-574-6964

On April 30, 2008, the Board received KITTITAS COUNTY CONSERVATION, RIDGE, AND FUTUREWISE'S (KCC *et al.*) application for Certificate of Appealability filed by Mr. Tromhimovich.

The Board's jurisdiction is generally limited[1] to addressing whether local governments within the Eastern Washington region have complied with the goals and requirements of the state's Growth Management Act (GMA – Chapter 36.70A RCW) and whether local governments within that region have complied with the provision of the Shoreline Management Act (SMA – Chapter 90.58 RCW). Pursuant to RCW 34.05.518(3, 6) this Board may file a certificate of appealability, authorizing direct review of the decision in this matter.

II. DISCUSSION AND FINDINGS

KCC *et al.* request that the Board to file a certificate of appealability. The Administrative Procedure Act authorizes direct review of the decisions of environmental boards, including the Growth Management Hearings Boards, and provides that a Board should issue a certificate of appealability if it "finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) fundamental and urgent statewide or regional issues are raised; or, (ii) the proceeding is likely to have significant precedential value."[2] Because all of the statutory criteria are met, the Board should issue a certificate of appealability.

Mr. Trohimovich contends a delay in obtaining a final and prompt determination of the issues in this matter is detrimental to all parties and the public interest, and all parties would benefit by a rapid and binding resolution of this case. While the Kittitas County Conservation (KCC) Petitioners (*EWGMHB* Case No. 07-1-0015) are concerned about development applications being vested to the noncompliant County code while an appeal is

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[1] See: RCW 36.70A.280

[2] RCW 34.05.518.

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pending, allowing land to be divided into three acre rural lot sizes, Mr. Trohimovich also points out the appellants, including Central Washington Home Builders Association *et al*, (CWHBA) would also benefit by a rapid resolution as well, since property owners and businesses represented by CWHBA still face uncertainty regarding the future of density in Kittitas County. Mr. Trohimovich further argues, traffic, inadequate water and sewer, poor fire protection, and a degraded environment are not good selling points for real estate, and therefore, a binding ruling requiring the County to fix its noncompliant zoning will provide certainty for the long term interests of CWHBA and other appellants.

Mr. Trohimovich contends adjacent counties (Yakima, Chelan, Grant, and King) and the region as a whole stand to benefit from a decision from the Court of Appeals. There are no cases from Division Three of the Court of Appeals on the issues of what rural densities comply with the GMA, or requirements for clustering and planned unit development regulations, or on the variety of rural density issues; therefore a quick appellate decision will have significant regional benefit.

Mr. Trohimovich argues a decision by Division Three of the Court of Appeals would provide significant precedential value. The Washington Supreme Court notes in *Viking Properties v. Holm,* 155 Wn.2d 112, 118P.3d 322 (2005), Growth Management Hearings Boards cannot set "bright line rules" regarding density, and the appellate courts have "yet to provide clear guidance on when a Board violates *Viking Properties'* bright-line rule prohibition, and whether previous rulings from all three Boards holding one dwelling unit (DU) per five acres as the minimum rural density may be utilized as a benchmark or presumption, or are a fact-based application of the GMA's prohibitions on urban growth outside urban growth areas," *Gold Star Resorts, Inc. v. Futurewise,* 140 Wn. App. 378,___, 166 P.3d 748, 760-761 (2007) (Agid.J., concurring), noting that one DU per five acres in jurisprudence from the Boards is a "rebuttable presumption," not a "bright-line rule."

And, finally Mr. Trohimovich contends this is the first opportunity this court has had the opportunity to review the question of what are valid rural densities, what are the

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requirements for clustering regulations, and what are the requirements for planned unit development regulations. Division Three of the Court of Appeals has not addressed this provision and a quick appellate decision will have significant regional benefit.

The Board's authority regarding Certificates of Appealability is set forth in RCW 34.05.518, which provides in relevant part:

> (3)(a) For the purposes of direct review of final decisions of environmental boards, environmental boards include those boards identified in RCW 43.12B.005 and growth management hearings boards identified in RCW 36.70A.250.
> (b) An environmental board may issue a certificate of Appealability if it finds that *delay* in obtaining a final and prompt determination of the issues *would be detrimental to any party or the public interest* **and either:**
> (i) Fundamental and urgent state-wide or regional issues are raised; or
> (ii) The proceeding is likely to have significant precedential value.

The Board is bound by the criteria established in RCW 34.05.518(3)(b)(i-ii) in determining whether to issue a Certificate of Appealability. In applying these criteria to the present case, and in evaluating the argument presented by Mr. Trohimovich's Application, the Board finds and concludes as follows:

The Eastern Washington Growth Management Hearings Board, EWGMHB, having reviewed the arguments of the Petitioner and being familiar with the law, finds that the statutory criteria for issuance of a certificate of appealability have been met. The issues raised herein are fundamental and of urgent regional and statewide interest. It is important to have this matter decided by Division Three of the Court of Appeals as soon as possible. The issue will have great precedential value in Eastern Washington and the State as a whole. The resolution of these issues will be of great benefit to the parties and their local constituencies. It is unlikely that the Superior Court will have the final review. Direct review by the Court of Appeals will be a more efficient use of the judicial systems valuable time.

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III. ORDER

Pursuant to RCW 34.05.518, the Board **grants** KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE'S Application for a Certificate of Appealability.

SO ORDERED this 6th day of May 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

John Roskelley, Board Member

Dennis Dellwo, Board Member

Joyce Mulliken, Board Member

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State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

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Intervenors.

Case No. 07-1-0015

CERTIFICATE OF SERVICE

Kittitas County Superior Court
Cause No. 08-2-00231-7

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; am an employee of this board and my business address is 15 West Yakima Avenue, Suite 102, Yakima, Washington 98902.

On this date, I mailed a true copy of CERTIFICATE OF APPEALABILITY, in the above entitled matter, together with a copy of the Final Decision and Order issued in EWGMHB Case No. 07-1-0015, submitted to the Clerk of the Court in Kittitas County, to each of the persons listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail at Yakima, Washington as addressed herein:

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Tim Trohimovich
Futurewise
814 2nd Ave., Ste. 500
Seattle, WA 98104

Gregory McElroy
1808 N. 42nd St.
Seattle, WA 98103

Kittitas County Board of Commissioners
205 W. 5th Ave.
Ellensburg, WA 98926

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Ms. Martha Lantz, AAG
P.O. Box 40110
Olympia, WA 98504

Jeff Slothower
P.O. Box 1088
Ellensburg, WA 98926

Timothy Harris
Andrew Cook
111 21st Ave. SW
Olympia, WA 98507

I certify under penalty of perjury, that the foregoing is true and correct.

DATED this 6th day of May 2008, at Yakima, Washington.

Angie Andreas

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Att. G

State of Washington
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Intervenors.

(Kittitas County Superior Court Cause No. 08-2-00239-2)

Case No. 07-1-0015

Order Granting Certificate of Appealability

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III. ORDER

Pursuant to RCW 34.05.518, the Board **grants** KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE'S Application for a Certificate of Appealability.

SO ORDERED this 6th day of May 2008.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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Case No. 07-1-0015

CERTIFICATE OF SERVICE

Kittitas County Superior Court
Cause No. 08-2-00239-2

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; am an employee of this board and my business address is 15 West Yakima Avenue, Suite 102, Yakima, Washington 98902.

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App. H

The Court of Appeals
of the
State of Washington
Division III

FILED

JAN 15 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

KITTITAS COUNTY CONSERVATION, et. al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent.

consolidated with

CENTRAL WASHINGTON HOMEBUILDERS ASSOCIATON, et. al.,

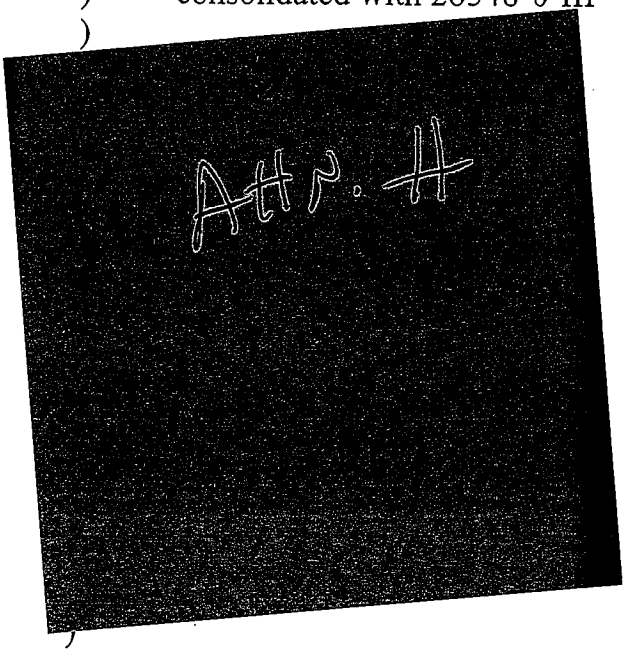
Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT, et. al,

Respondents.

No. 26547-1-III
consolidated with 26548-0-III



COMMISSIONER'S RULING

The Court has considered the motion for direct review filed in the above consolidated cases by Kittitas County Conservation, RIDGE and Futurewise. The Court

notes that the Washington State Department of Community, Trade and Economic Development (Department) approves the motion for direct review. And, the Central Washington Home Builders Association does not oppose it.

This Court has also considered Kittitas County's objections to direct review, as well as the record – which includes a Certificate of Appealability by the Eastern Washington Growth Management Hearings Board (Board) – the file, telephone argument, and the memorandums of the movant, the Department, and Kittitas County.

This Court has independently reviewed the record and agrees with the factual "Discussions and Findings" of the Board, as set forth in its Certificate of Appealability, that these cases satisfy the standards of RCW 34.05.518(3)[1] for direct review. Therefore, direct review is accepted, *see* RAP 6.3. The Clerk of this Court shall set a perfection schedule in these consolidated matters.

This Court has also considered the Department's request (made in its answer to the motion for direct review) to re-denominate the parties. If the Department decides to

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[1] RCW 34.05.518(1) provides for direct review of a decision of an administrative agency in the court of appeals, upon the acceptance of such review by the court of appeals after a certificate of appealability has been filed by an environmental board.

RCW 34.05.518(3)(b) provides that "An environmental board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) Fundamental and urgent statewide or regional issues are raised; or (ii) The proceeding is likely to have significant precedential value."

RCW 34.05.518(5) states that for the appellate court to accept direct review, it

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proceed with that request, it must do so by motion and notice to the parties, as set forth in RAP 3.4.

January 15, 2008

Monica Wasson
Commissioner

considers the same criteria as the board, as outlined in subsection (3)

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